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ABSTRACT

After considering the origins and constraints on school district authority and the legitimate exercise of that authority in carrying out the district's legislative, executive, and quasi-judicial functions, the author presents chapters on school boards, including consideration of open meeting laws and individual board member liability; the school attorney; the school district evaluation system; student-related matters such as admission, jurisdiction, suspension, and corporal punishment; and collective bargaining, including discussion of the management team as an alternative to bargaining. A special supplement discusses Oklahoma Senate Bill 249 on teacher tenure. (IRT)

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OCTOBER 12, 1977

A LEGAL HANDBOOK ON THE ADMINISTRATION AND MANAGEMENT OF SCHOOL DISTRICTS

Dr. Larry L. French

General Counsel

Southern Illinois University at Edwardsville

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A LEGAL HANDBOOK ON THE ADMINISTRATION AND MANAGEMENT OF SCHOOL DISTRICTS

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INTRODUCTION

Education is a function of the state. School districts, as political sub-divisions of the state are legislatively established, authorized and controlled, and therefore must work within legislatively established perimeters. In other words, simply because the "school code" does not prohibit a particular action does not mean that the governing unit of the school district may take that particular action.

A school district must remember that it is not afforded the protection of the Eleventh Amendment as it relates to the immunity of the "State." Justice Rehnquist said in the recent case of Mt. Healthy City School District Board of Education v. Doyle:

> "On balance, the record before us indicates that a local school board such as petitioner is more like a county or city than it is like an arm of the State. We therefore hold that it was not entitled to assert any Eleventh Amendment immunity from suit in the federal courts."
> (45 L.W. 4079, January 11, 1977).

The essence of the Eleventh Amendment is that the state, or an "arm" thereof, cannot be sued in Federal Court unless it consents to such suit. (Edelman v. Jordan, 415 U.S. 651, 1974). What protection, if any, does a school district have under the law? It has been held that a school district and its governing board and other appropriate school officials are immune from liability for personal injury. This decision assumes action in "good faith" and without malice. (Wright v. Consolidated School District No. 1, 19 P.2d 369). This holding has been modified somewhat by Schrom v. Oklahoma Industrial Development, 536 P.2d 904 (Okla. 1975) and recently reiterated in Lamont Independent

School District #I-95 of Grant County, et al. v. Swanson, 548 P.2d 215 (Okla. 1976), wherein it was held that the securing of liability insurance constitutes a waiver of governmental immunity to the extent of the insurance coverage only.

Additionally, a school district and its official school board has been held not to be a "person" within the purview of the federal civil rights statutes and is therefore not amenable to suit under Title 43 U.S.C.A. § 1938. /Summers, et al. v. Civis et al., 420 F. Supp. 993 (U.S.D.C.W.D. Okla. 1976)/ This, in effect, means that only those individuals serving as school board members and/or administrators can be held liable in a civil rights action. /See Wood v. Strickland, 95 S.Ct. 992 (1975)/

State statutes permit suit upon contract, allowing the school district to both sue and be sued. Obviously, contractual matters exist at the very heart of school district operations.

The point of all this "prospective liability" information is to emphasize the critical importance of efficient, effective and legal administration and management of school districts in order to fall within the edict of Mr. Justice Fortas in the landmark decision of Epperson v. State of Arkansas, /89 S.Ct. 266 (1968)/:

> "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint ...By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values."

However, Justice Fortas continued with the following "caution sign" which should hang upon the wall of every Board of Education meeting room in this country:

> "THe vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."

Typically, the glaring issue confronting school boards can be stated in terms of the language of Mr. Chief Justice Burger in Hortonville Joint School District No. 1, et al. v. Hortonville Education Assn., et al., 96 S.Ct.1 (1975):

> "The only decision remaining for the Board therefore involved the exercise of its discretion as to what should be done to carry out the duties the law placed on the Board." (Emphasis added.)

The United States Constitution contains enumerated powers as to the Congress and prohibitive measures as to the Federal Government generally. A literal application of the "enumerated power" doctrine, as found in Art. I, § 8, would of course have paralyzed the federal government as it would have prevented the exercise by it of any power not expressly set forth in the Constitution. It was this consideration which motivated Chief Justice Marshall, in McCulloch v. Maryland, /4 Wheat. 316 (1819)/ to hold that, in addition to those powers specifically enumerated in the Constitution, certain broad federal powers are to be implied from the "necessary and proper" clause. Please consider these words of the then Chief Justice:

> "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional."

To put these words in context with school district operation:

> "Let the end be legitimate, let it be within the scope of statutory authority, and all means which are plainly adapted to that end, which are not prohibited nor unauthorized, but are consistent with the letter and spirit of legislative authority commensurate with the Constitution, both State and Federal, are reasonable, justifiable and constitutional."

The principle of "governance," again, stems from state legislative authority and that authority is founded upon the state constitution. Federal intervention in recent years has been the result of state agencies and their

respective political sub-divisions acting contrary to certain principles of the United States Constitution and Federal statutes and regulations. Not all statutes and regulations necessarily carry constitutional weight as was clearly indicated in the recent U.S. Supreme Court decision of General Electric Co. v. Gilbert, /45 L.W. 4031 (December 7, 1976)/ wherein the Court held that the Equal Employment Opportunity Commission's 1972 "Guidelines," which provided that disabilities caused by pregnancies should, for all job-related purposes, be treated as any other temporary disability, sharply conflict with the proper interpretation of Title VII's sex discrimination provisions. The Court simply said that the "Equal Protection" clause of the Fourteenth Amendment does not go that far. The reader is referred to Dandridge v. Williams, /397 U.S. 471/ wherein the Court stated:

> "The Equal Protection Clause does not require that a state must choose between attacking every aspect of a problem or not attacking the problem at all."

School Boards across the country were shocked when the Supreme Court told them (in so many words) that they were reasonably bound to be knowledgable of settled and indisputable constitutional rights. To reminisce briefly about the "spiked punch" case out of Arkansas (Wood v. Strickland, 95 S.Ct. 992, 1975), the Court said:

> "The official must himself be acting sincerely, and with a belief that he is doing right; but an act violating a student's constitutional rights can be no more justified by ignorance, or disregard of settled indisputable law on the part of one entrusted with supervision of students' daily lives, than by the presence of actual malice."

Perhaps, then, a review of these so-called indisputable constitutional rights might be appropriate and there seems to be no more appropriate point to begin than with Mary Beth Tinker.

In Tinker v. Des Moines Independent Community School District, /393 U.S. 503 (1969)/ these infamous words were spoken by Mr. Justice Fortas:

"Neither students nor teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."

Before proceeding to a more recent free speech case, it should be noted that Tinker clearly stands for the proposition that school officials do not possess absolute authority over their students; hence the demise of "in loco parentis." The unusual factor in Tinker seemed to be the establishment of the same rights in the identical degree for students as had been previously established for adults, or in the case of school districts, teachers. The Epperson case stood for the principle of "Academic Freedom" for professional employees of learning institutions. Although loyalty oaths can be required of governmental employees so long as the purpose is not to exclude persons solely on the basis of organizational membership, /see Keyishian v. Board of Regents, 385 U.S. 589 (1967)/ a school district is prohibited from compelling a student to salute the flag. /See West Virginia State Board of Education v. Barnette, 63 S.Ct. 1178 (1943)/ And finally, the Supreme Court distinguished between the employment rights of "tenured" and "non-tenured" personnel in Board of Regents v. Roth, /92 S.Ct. 2701 (1972)/ and Perry v. Sindermann, /92 S.Ct. 2694 (1972)/. Roth stands for the proposition that a non-tenured employee is entitled to the same due process procedures normally reserved for a tenured teacher, only if he can substantiate a "property interest" of a magnitude which must be protected in light of constitutional principles. For example, the Mt. Healthy case /previously cited/ raised a First Amendment "freedom of speech" issue and the Court was clear in determining that the teacher could not be terminated for such an exercise of this guarded constitutional right; however, the Court proceeded to indicate that justification for termination might be present absent the constitutional issue and if so, then such termination would be proper. Free speech was at issue in City of Madison, Joint School District No. 8, et al. v. Wisconsin Employment Relations Commission, et al. /45 L.W. 4043 (December 8, 1976)/

wherein the Court held that collective bargaining procedural requirements were insufficient to curtail the right of free speech by a school district employee before a Board of Education meeting.

The "openness" principle of government has not been neglected when it comes to litigation. In Oldham v. Drummond Board of Education, et al. /542 P.2d 1309 (Okla. 1975)/ the Court, in construing Title 25 O.S. § 201, held that the vote of each individual board member as to an "action item" must be recorded, as well as being "publicly cast." The utilization of so-called "executive sessions" may be one of the most abused discretions permitted a governing board.

The United States Supreme Court decision in Goss v. Lopez /95 S.Ct. 729 (1975)/ made it clear that pursuant to the state constitution, a student is entitled to a public education. Once this right has been extended, it may not be withdrawn upon grounds of misconduct absent fundamentally fair procedures to determine whether the misconduct has occurred. This right was defined by Goss as a "property interest."

Because school districts possess only the power derived from statutes, they cannot exercise unrestricted authority over persons. A code of student conduct is normally authorized by statute as a control measure to assure that the educational process can proceed unfettered. The rules implemented to control conduct may exist for only a reasonable and necessary purpose. Consider the following "purposes":

1. To create and preserve a proper atmosphere for learning to take place.
2. To insure the safety of personnel and students.
3. To insure the preservation of school property.

Remember, however, that any rule which imposes a significant invasion into the private lives of children and their parents requires a showing of greater

justification and demonstrable need than one regulating in-school behavior. Goss told us essentially the same thing when Mr. Justice White stated:

> "Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures (as opposed to short term suspensions of perhaps 10 days or less.)"

Flexibility, then, is crucial in the implementation of procedures designed to assure due process of law. Accordingly, we should speak in terms of "minimal" protections to reach the objective of constitutional compliance.

As a statutory enactment may allow discretion, it may also limit discretion. For example, there is no doubt that under statutory authorization, a board of education has absolute discretionary authority as to whether or not to open a school building to activities and meetings of outside organizations (this obviously does not include any religious group); however, the only absolute discretion is whether to open the building to an outside organization or not to open it. Once a decision has been made to open the building, then any administrative policy pursuant thereto may not restrict who is permitted to utilize the facility, see Hennessey, et al., v. Ind. School District No. 4, 47 O.B.A.J. 1697 (1976).

Public expenditures are strictly statutorily controlled and so they should be. Discretionary authority does not exist in terms of spending school district monies. In addition, we find today more and more areas of operational concern being restricted statutorily, i.e. transfers, transportation, competitive bidding, elections, curriculum and graduation requirements. The trend appears to be toward "limited discretionary authority."

It should be remembered (and it is often forgotten) that school board members and certain administrators are public officials and those personnel so employed are public employees. The "public official" is either elected or appointed to serve the best interests of the citizenry. Wood. v. Strickland,

earlier cited, is a grim reminder of this fact. By holding that school officials enjoyed only "qualified" immunity as distinguished from "absolute" immunity and accordingly, would not be immune from suit under Section 1983 unless:

1. Their wrongful behavior had been carried out in good faith to fulfill their official responsibilities;

2. The complained-of conduct was, under the circumstances, sincere and reasonable;

3. That although they misbehaved, their action was not maliciously motivated, and;

4. They did not know nor reasonably should have known that their misconduct deprived the injured party of a constitutionally protected right.

Administering the state educational process is serious business and the commensurate rule-making authority should not be taken lightly. Further, there should not exist any particular distinction between operation requirements of a large, middle-size or small district. Not one Court decision reviewed made any such distinction nor did it even come to mind. Size may well relate to complexity, but not to constitutional compliance. As was accurately noted in the Hortenville case by Mr. Chief Justice Burger:

> "The School Board, in whom the State has vested the policy making function, is the body with the overall responsibility for governing the school district, and its members are accountable to the voters for how they discharge their statutory duties ...permitting the Board to make the policy decision at issue here preserves its control over school district affairs, leaving the balance of power...where the state legislature has placed it."

Preceding this statement, the Court noted that state law vested the governmental or "policymaking" function in the School Board as well as two additional functions, i.e. executive and quasi-judicial. Additionally, certain innovative methods relating to administration and management will be discussed and "Handbook" will examine the roles of various school officials.

To answer a question with a question is often considered rude; but when approached with a specific question which relates to a discretionary

decision on the part of a school official and/or board of education, my response is: is the action (or inaction) reasonable (is it founded upon proper purpose) and can it be justified if challenged. If there is no statutory authority and the issue at hand cannot be resolved from a statement of general powers and duties, then the answer is simple...no!

Oftentimes there is an issue upon which there are logical arguments on both sides of the question. An example here would be a rule regulating residency requirements of employed personnel. The question is especially complicated in that it not only involves a constitutional question, but relates to contractual matters and matters of a public nature as well. Sometimes, in matters such as these, it might be best to table the issue indefinitely. The doctrine of practical politics play an important role as well in the efficient, effective and legal administration and management of school districts.

THE LEGITIMATE AUTHORITY OF SCHOOL DISTRICTS

The elective process is applicable to the governing authority of school districts. The traditional concept of democratic representation has been modified somewhat, in that school board members are ordinarily elected on an "at-large" basis from the community.

It has been said that "a school board exists only when it meets; between meetings, a school board is but a shadow." This is true, in that school board members are elected public officials and the "act of governance" itself cannot occur except when the board is in session with a quorum, although the power and responsibility of the office prevails on a continuing basis in the service of the community-at-large.

A school district is unique in that it is totally statutorily controlled. Its uniqueness is magnified when one considers that the governing board performs all three governing functions: 1) legislative (rule-making), 2) executive (enforcement and board action), and 3) quasi-judicial (conducting hearings). This paper is designed to examine each of the foregoing functions in light of school district powers, responsibilities, duties and obligations.

THE LEGISLATIVE FUNCTION

In Independent School District No. 8 of Seiling v. Swanson, 553 P.2d 496 (Okla. 1976) the Oklahoma Supreme Court solidified the doctrine of reasonableness as to the promulgation of rules and regulations by school districts. Specifically, the Court stated:

> "School Boards are empowered to adopt and enforce those rules which are necessary to create and preserve a proper atmosphere for learning to take place..." (emphasis added)

The Court additionally noted that any rule must exist for a "reasonable and necessary purpose." This is the judicial test for every rule which is approved by a Board of Education pursuant to the following authority:

> "The board of education of each school district shall have power...to make rules and regulations, not inconsistent with the law or rules and regulations of the State Board of Education..." (See 70 O.S. § 5-117)

If a rule possesses a "necessary purpose" and is "reasonable" by its nature and application, then the rule-making authority should be able to justify the existence of such rule, if challenged. Accordingly, the rule-making power of a school district is a precious covenant, and should be protected by the utilization of definitive procedures relative to the process.

Consider the following mechanism prior to the adoption, amendment or repeal of any rule by a school district:

1. Issuance of notice to all interested parties, stating the proposed rule (or the nature thereof) and the manner in which such persons can respond if they so choose.

2. Conduct a public hearing if necessary when the rule in question is a controversial one and response is significant.

3. Utilization of any pertinent advice through advisory committees, etc.

4. Upon actual passage of said rule, assure that notice is given those parties subject to the rule's edict.

A format for the approved rule would be as follows:

1. Citation of statutory authority (expressed or implied) (note that school districts possess only that power

derived from statutory enactment) supporting the rule;

2. A preamble (statement of purpose for the rule);

3. Statement of the rule itself (hopefully indicating to whom the rule applies and followed by an effective date;

4. A listing of interpretations in regard to the rule.

When a school district has the legitimate authority to promulgate rules and regulations in order to maintain and operate a complete public school system of such character as the board of education shall deem best suited to the children of the district, wide discretion is provided to that school district. The district should take measures to guard against abuse of that discretion. Obviously, discretion, in one sense, means having the authority to interpret the rules of the district when a question of interpretation arises.

When such discretion is exercised, it should be documented as a "ruling" and filed with the rule. In the future, then, when a question again arises, there may be a precedent available amongst the "rulings".

Even by strictly adhereing to the foregoing recommendations, a rule still may fail to pass muster. It has happened before and it will happen again. Following these "helpful hints", however, will greatly assist the school district not only in assuring that its discretion is not abused but will enhance public relations among the diverse elements of education, i.e. students, parents, taxpayers, teachers, administrators, board members, etc.

The goal of every education official who participates in the governance factor of education must be "the reasonable exercise of authority"!

The general rule has been that every legislative enactment, whether it be statutory or administrative, has a "presumption of validity". In other words, a rule is presumed to be valid on its face as the body of governance concerned does not act in vain. The reverse holds true, however, in regard to any rule which tends to restrict any of the constitutional freedoms, i.e. speech, unreasonable search and seizure, religion, etc.

A rule may be either procedural or substantive. The procedural rule must meet the test of "procedural due process" which typically has been outlined in a judicial decision or prior statutory enactment. Such a rule will concern itself with notice, timetables, reasons (causes) and hearings. A substantive rule exists as the "permission" or "prohibition" of which the governing body deems necessary to solidify a particular purpose. Its purpose, further, must be able to justify the very existence of the rule itself and additionally, the rule must be applied uniformly and in a reasonable manner.

A "checklist" for any substantive rule would be as follows:

1. Does the content of the rule indicate to whom it applies?
2. Does the content of the rule specifically indicate the nature of the rule itself?
3. Does the content of the rule reflect legitimately its purpose?
4. Does the rule contain an "effective date"?
5. Does the rule include procedural steps for its application?
6. Does the rule cite the "legitimate authority" for its existence?

THE EXECUTIVE FUNCTION

The importance of official school board minutes cannot be overemphasized in these litiginous times. The sole evidence of what exactly occurred during a school board meeting is found in the minutes. Accordingly, it would seem appropriate to provide assistance to the school superintendent or designated administrative official who is responsible for organizing and conducting regular and/or special school board meetings during the course of the fiscal year. Here follows, then, a checklist, including appropriate comments relative to the efficient and effective conduct of school board meetings:

1. PROVIDE NOTICE

Most school laws provide that school boards will meet at least once a month at a regularly appointed date, time and place. Many school districts meet more often as the extent of business is more than can be adequately dealt with at one meeting per month. The regular meetings of the board of education should be scheduled and notice provided prior to the commencement of the fiscal year. Any changes thereafter must be appropriately publicized to assure all school district patrons are notified. A more critical problem lies in the area of special meetings. Unfortunately, there is very little statutory and/or regulatory authority as to what type of notice is to be provided. Certainly, all board members and appropriate staff personnel must be notified. Publication of such special meetings should be attempted, although in many small school districts a daily edition of a local newspaper is not provided. In these instances, bulletins should be posted at appropriate points within the community whereby the patrons may inform themselves of any such special meetings. Oklahoma law does now require that a school district board of education provide advance notice as to a board meeting. (See section under School Boards: Open Meeting Law).

NOTIFICATION OF BOARD MEETINGS

Notification to Public

School Board meetings are public meetings and open to the public.

It is the policy of the school board to announce in advance whenever practicable through the newspapers and such other means as may appear appropriate, the date, time and place of all regular and special meetings and the major topics to be discussed.

All citizens shall be especially encouraged to attend the annual budget hearing(s) of the school board.

School personnel are also invited to attend school board meetings.

Notification to School Board Members

Notice of each regular meeting of the school board with agenda will be delivered to each member at least 72 hours prior to each meeting.

Notice of all special meetings shall be given to the members of the school board at least 24 hours prior to the time stated for the meeting to convene. Said notice shall indicate the purpose of such special meeting.

Notification to _____

Notice of all regular and special meetings of the school board shall be filed with the _____ not less than 24 hours before such meetings including Saturdays but not Sundays and holidays.

2. ESTABLISH AND DISTRIBUTE THE AGENDA

The agenda represents the "game plan" for the board meeting. As such, the agenda, once prepared, should be distributed to all board members, appropriate staff personnel, parties who have requested an appearance before the board and others who have a "need to know." This may well include the local newspaper and other community public officials. Moreover, the school board attorney should be provided an agenda, particularly where the attorney does not attend every board meeting. It will provide him the opportunity to review the agenda and earmark those items, if any, that may prove difficult or require particular legal assistance. In addition, any special reports and/or voluminous preparations should be distributed to the board members prior to the meeting in order to asssure their familiarity with the documents prior to board action. The agenda need not follow any particular format, although it is highly recommended that those items requiring presentations of specific personnel be placed at the top of the agenda so that they then may be excused. It is also recommended that "executive sessions" be scheduled last on the agenda. Obviously, an agenda may vary during the course of the board meeting, depending upon the facts and circumstances involved. An effort should be made, however, to follow the agenda closely to assure an effective and efficient meeting.

3. MAKE ALL PHYSICAL ARRANGEMENTS

Physical arrangements are often overlooked, particularly in small school districts. Many small school districts will only have in attendance the board members and the executive officer. This does not mean that physical arrangements should be forgotten. Seating should be adequate for all parties who may attend. Many boards meet in the superintendent's office, which normally is not large enough to conduct a school board meeting. One possibility would be to set up the meeting in the regular conference room and/or superintendent's office; then if a crowd gathers the meeting can be moved to the auditorium or cafeteria area.

Pencils and writing material should be provided each board member as well as each staff member. Items such as a public address sytem, ash trays, dictation equipment, podiums, writing surfaces for staff personnel and the press should be provided.

4. COMMENCE THE MEETING ON TIME AND ESTABLISH AN ANTICIPATED TIME OF ADJOURNMENT

Board meetings today have become longer in duration and accordingly, extremely tiresome and burdensome. Typically, board meetings commence at 7:00 or 7:30 in the evening. If a lengthly meeting is anticipated, the district might consider either starting the meeting at an earlier time or setting up an "adjourned meeting" at a later date in order to complete the business before the board. Board meetings that extend until two, three or four o'clock in the morning will generally fail in their efforts to act upon board business efficiently and effectively. Moreover, preparation prior to the meeting by the appropriate staff personnel will serve to shorten and make more efficient the board meetings. The Superintendent should be cognizant of time limitations as to presentations and reports and make an effort to avoid extraneous discussions.

5. ASSURE THAT THE BOARD CHAIRMAN IS FAMILIAR WITH ROBERTS RULES OF ORDER

One secret leading to the efficiency and effectiveness of a school board meeting, is to assure that the board chairman is familiar with Roberts Rules of Order and general Board Meeting Procedures. The business at hand will then be conducted in an appropriate manner. Items such as motions, debates, discussions, tabling, adjournments, are all critical and how to get "in and out" of particular situations is important and must be approached in a firm but courteous manner by the board chairman, with the competent assistance of the Superintendent.

6. PROVIDE A COPY OF THE INITIAL DRAFT OF BOARD MINUTES TO THE SCHOOL BOARD ATTORNEY

The school board attorney can be invaluable to the Superintendent in assisting him in the preparation and final draft of the board minutes. This

document, as indicated earlier, constitutes the sole evidence of what happened that particular evening. Many school districts tape their meetings with the assistance of a transcription secretary. It is sometimes difficult for a secretary to determine what and what not to include within board minutes. A "certification of transcription" should always be attached to each set of board minutes to provide evidence of who transcribed the information and to indicate accuracy. The school board attorney can also assist the superintendent in preparing resolutions and policy matters passed upon and can earmark those items which should be "extracted" from said minutes and "inserted" in the appropriate policy manual, faculty handbook, etc. Further, these particular items must be distributed to those patrons, personnel, students, etc. who may be subject to the action taken. When they have been officially approved, the board minutes should be signed by all board members, the executive officer and/or Superintendent and the board clerk. This is good practice and good policy. An approval form might also be added for the school board attorney. After the final draft the board minutes is prepared it should be distributed to each board member prior to the next meeting so they will have the opportunity to review them and approval of the minutes at the next board meeting will take a minimum of time. As an added note, it is good practice to <u>automatically</u> provide a copy of the approved board minutes to the local newspaper to assure openness and cooperation. Board minutes are public records and should be filed and retained appropriately.

7. <u>UTILIZE PLANNING SESSIONS</u>

School board meetings can be conducted in a more efficient and effective manner if planning sessions are utilized by the superintendent and his staff personnel. Special meetings, such as those called to consider bid proposals, hearing relating to school district personnel and/or students should be dealt with specially and held in accordance with law, the advice of the school board attorney and the convenience of those parties whom the meeting concerns.

8. CONCLUSION

Other suggestions that might be considered for the good management of a school board meeting are as follows:

a. Roll call votes;

b. Utilization of a public address system, if necessary;

c. Provision of a podium for those speaking to the board;

d. Designation of a certain location of the press/media;

e. Provide board minute copies to all local newspapers automatically (many laws including Oklahoma requires that copies be provided upon request only);

f. Keep extraneous discussion to a minimum.

Good management is important today, particulary with regard to a school district business. Public officials are closely scrutinized as to their actions, performance, responsibilities and duties. Each board meeting provides the opportunity for the public to observe their duly elected public officials in action and specifically enables them to observe the expenditure of their public moneys and the administering of their public properties. When dealing with the public and their particular "assets," public officials must take responsible and efficient action. Board minutes are the only documents which actually reflect the board action of a school district. It is a permanent record, as well as a public record which must be maintained on file at the central office of the school system for all to see upon their timely request.

THE QUASI-JUDICIAL FUNCTION

PUBLIC HEARINGS

Section 3 of Article 2 of the Oklahoma Constitution provides as follows:

> "The people have the right peaceably to assemble for their own good, and to apply to those invested with the powers of government for redress of grievances by petition, address, or remonstrance."

Any educational institution in the State of Oklahoma financed by public funds constitutes "those invested with the powers of governemnt." From time to time the state legislature conducts public hearings concerning critical legislative issues. More and more boards of education are being required to conduct public hearings during which school patrons have the opportunity to present their ideas to their elected officials. Further, more formalized hearings are required pursuant to specific statutory edicts, i.e., local board hearings as to the termination of certified employees.

Oftentimes, controversies arise within the school community in the course of which the trustees are called upon to determine certain issues within their discretionary authority. A distinction is to be made between the typical public forum and the individual hearing that may be accorded certified personnel and/or students pursuant to an alleged cause for termination and/or alleged violation of school policy. Board trustees must be aware of restrictions placed upon them pursuant to the open meeting law (Title 25, O.S., Section 201) in the conduct of hearings and further, should be very concerned with such basic procedural due process provisions as notice and the opportunity to appear and respond.

Oklahoma's Administrative Procedures Act, Title 75, Oklahoma Statutes, Section 301, should be required reading for all elected board members. Oklahoma school districts are exempt from this act, but institutions of higher education are not, except with respect to expulsion of students for disciplinary reasons. This act requires that before any rule is adopted by any State agency, notice

must be provided as to the intended action and then a public hearing set before final determination is rendered. The act further provides for court action and sets out in detail, rules and procedure relative to so-called "individual proceedings."

The principle of "exhaustion of administrative remedies" has always been important. This simply means that before an aggrieved party may proceed to a court of law for redress and relief, that party must exhaust all administrative channels which are designed to afford redress and relief. This premise is applicable to every governing board in that its intent is to permit the local board to determine the matter within its own administrative channels prior to the filing of a lawsuit. Many lawsuits occur simply because of a lack of communication between the grievant and the governing board. Setting up procedures to assure that these grievances are communicated to the governing board is an important and critical step towards preventing court litigation. Accordingly, your attention is directed to the attached proposed rules procedure relative to public hearings which are designed to emphasize the doctrine of "exhaustion of administrative remedies."

PUBLIC HEARINGS
(Rules of Procedure)

The Board of Education adopts and promulgates the following rules which shall govern all hearings of the Board of Education.

1. HEARINGS BEFORE THE HEARING EXAMINER

These rules shall apply to all formal hearings before the Hearing Examiner for the Board of Education in contested cases.

A. Hearings or Appeals. All requests for hearings or appeals so authorized or as otherwise provided for by resolution of the Board of Education shall be in writing to the president of the Board or the superintendent. Appeals from the decision of the superintendent shall include the appellant's statement of the issues to be presented in said appeal. All hearings in personnel actions held pursuant to the requirements of Title 25, O. S., Section 201. All hearings held under B(2) will be public.

B. Notice of Hearing.

(1) In personnel actions, written notice of hearing shall be sent by the president of the Board, or his designee, to all interested parties not less than twenty (20) days prior to the hearing. Such notice shall state the charges and/or issues. It shall also state the date, time,and place of the hearing.

(2) In all other cases involving appeals authorized by law, written notice of hearing shall be sent by the president of the Board, or his designee, to all interested parties not less than twenty (20) days prior to the hearing and shall outline a counter statement of charges and/or issues, if any, involved in the proceeding, if the superintendent shall deem such to be materially and substantially different from those previously raised or decided by said appellant before the superintendent in the first instance. Any disagreement arising from the above shall be resolved by the Board.

(3) All interested parties shall be afforded an opportunity to be present at formal hearings.

C. Parties - Representation.

(1) "Party" includes any person or agency named or admitted as a party. Any person or agency may be admitted as a party for limited purposes upon the satisfactory demonstration of the nature and extent of its interest to the Hearing Examiner.

(2) All parties appearing at formal hearings shall have the right to appear in proper person or with counsel. All such parties shall have the right to be accompanied, represented, and advised by counsel.

D. Records - Transcript.

(1) The Hearing Examiner shall prepare an official record, which shall include all pleadings, testimony, exhibits, and other memoranda filed in the proceeding.

(2) A stenographic record of the proceedings shall be made at the expense of the school system and shall be transcribed. Cost of copies of the transcript of any proceedings, or part thereof, shall be paid by the party requesting such copy.

E. Presiding Officer - Duties and Authority. The Hearing Examiner shall be the presiding officer and shall have charge of the hearing, with authority to permit the examination of witnesses, admit evidence, rule on the admissibility of evidence, and adjourn or recess the hearing from time to time. The Hearing Examiner shall cause an oath to be administered to all witnesses testifying in the proceedings.

F. Order of Procedure. The order in which the parties shall present their case shall be determined by the Hearing Examiner except in cases of appeals as follows:

(1) In an appeal on a dismissal or suspension, the superintendent shall proceed first.

(2) In all other appeals, the appellant shall proceed first.

G. Examination of Witnesses and Introduction of Evidence.

(1) The strict judicial rules of evidence shall not be applicable to hearings conducted hereunder, and, in each case, the test of admissibility shall be whether the evidence is reasonably relevant to a material issue and whether it has substantial probative value with respect to such material issue. The Hearing Examiner may limit or refuse to admit cumulative or repetitive evidence, and may curtail redundant questioning. He may encourage (but shall in no event coerce) the parties, where possible, to make proffers and stipulations in place of cumulative evidence. All testimony shall be given under oath.

(2) Counsel for any party may submit evidence, examine and cross-examine witnesses, and file objectives, exceptions, and motions; provided, however, that where a party is not represented by counsel, all such submission of evidence, examination and cross-examination of witnesses, and filing objections, exceptions, and motions shall be done and presented by the party.

(3) The Hearing Examiner may examine all witnesses called by any party. He may call as a witness any person whose testimony may be relevant.

H. Briefs. Any party may submit briefs of the issues of fact and law involved in the hearing in such form as the presiding officer may designate.

I. Findings. The findings, conclusions, and recommendations of the Hearing Examiner shall be distributed to or mailed to the parties and the Board not more than fifteen (15) days after the completion of the hearing and receipt of the transcript or the filing of briefs if required or authorized. The Board shall review this material and render a decision in each case within thirty (30) days of the receipt of the Hearing Examiner's findings.

J. Arguments. Prior to rendering a decision in cases heard before a Hearing Examiner, the Board may allow the parties to the proceedings an opportunity to make arguments before it, if desired by the parties. Such arguments shall be limited to not more than thirty (30) minutes or such time as the Board may allow by each principal party in interest. The Board attorney shall be present when arguments are heard.

K. Decision and Order. Each decision and order of the Board shall be delivered in writing, unless it shall immediately follow the hearing, in which case it shall be delivered orally and thereafter in writing, with copies to all parties. Each decision and order shall be accompanied by findings of fact, conclusions of law, and specific disposition of the case and shall be provided to the individual. Formal action of the Board shall be taken publicly at a Board meeting following the hearing, but no other information will be released by the Board or school administration except as noted above.

2. HEARINGS BEFORE THE BOARD OF EDUCATION

These rules shall apply to all formal hearings before the Board of Education in contested cases. Said rules shall not apply to conferences or other informal investigations or proceedings at or upon which no formal ruling or decision is made, or to any proceeding in a noncontested case.

A. Hearings or Appeals. All requests for hearings or appeals so authorized or as otherwise provided for by resolution of the Board of Education shall be in writing to the president of the Board or the superintendent. Appeals from the decision of the superintendent shall include the appellant's statement of the issues to be presented in said appeal.

B. Notice of Hearing.

(1) In personnel actions, written notice of hearing shall be sent by the president of the Board, or his designee, to all interested parties not less than twenty (20) days prior to the hearing. Such notice shall state the charges and/or issues. It shall also state the date, time, and place of the hearing.

(2) In all other cases involving appeals authorized by law, written notice of hearing shall be sent by the president of the Board, or his designee, to all interested parties not less than twenty (20) days prior to the hearing and shall outline a counter statement of charges and/or issues, if any, involved in the proceeding, if the superintendent shall deem such to be materially and substantially different from those previously raised or decided by said appellant before the superintendent in the first instance. Any disagreement arising from the above shall be resolved by the Board.

(3) All interested parties shall be afforded an opportunity to be present at formal hearings.

C. Parties - Representation.

(1) "Party" includes any person or agency named or admitted as a party. Any person or agency may be admitted as a party for limited purposes upon the satisfactory demonstration of the nature and extent of its interest to the Board.

(2) All parties appearing at formal hearings shall have the right to appear in proper person or with counsel. All such parties shall have the right to be accompanied, represented, and advised by counsel.

D. Records - Transcript.

(1) The Board shall prepare an official record, which shall include all pleadings, testimony, exhibits, and other memoranda or material filed in the proceeding.

(2) A stenographic record of the proceedings shall be made at the expense of the school system and shall be transcribed. Cost of copies of the transcript of any proceedings, or part thereof, shall be paid by the party requesting such copy.

E. Presiding Officer - Duties and Authority. Each hearing shall be held before not less than a quorum of the Board. The president, or in his absence the vice-president, and in the absence of both a member designated by the president, shall be the Presiding Officer and shall have charge of the hearing, with authority to permit the examination of witnesses, admit

evidence, rule on the admissibility of evidence, and adjourn or recess the hearing from time to time. The Presiding Officer shall cause an oath to be administered to all witnesses testifying in the proceedings.

F. Order of Procedure. The order in which the parties shall present their case shall be determined by the Presiding Officer except in cases of appeals as follows:

(1) In an appeal on a dismissal or suspension, the superintendent shall proceed first.

(2) In all other appeals, the appellant shall proceed first.

G. Examination of Witnesses and Introduction of Evidence.

(1) The strict judicial rules of evidence shall not be applicable to hearings conducted hereunder, and, in each case, the test of admissibility shall be whether the evidence is reasonably relevant to a material issue and whether it has substantial probative value with respect to such material issue. The Presiding Officer may limit or refuse to admit cumulative or repetitive evidence, and may curtail redundant questioning. He may encourage (but shall in no event coerce) the parties, where possible, to make proffers and stipulations in place of cumulative evidence. All testimony shall be given under oath.

(2) Counsel for any party may submit evidence, examine and cross-examine witnesses, and file objections, exceptions, and motions; provided, however, that where a party is not represented by counsel, all such submission of evidence, examination and cross-examination of witnesses, and filing of objections, exceptions, and motions shall be done and presented by the party.

(3) The Presiding Officer, or any person designated by him for the purpose, may examine all witnesses called by any party. He may call as a witness any person whose testimony may be relevant. Any Board member may examine any witness.

H. Briefs. Any party may submit briefs of the issues of fact and law involved in the hearing in such form as the Presiding Officer may designate.

I. Counsel. The Presiding Officer of the Board may request the Board attorney to participate in any hearing as counsel for the Board.

J. Decision and Order. Each decision and order of the Board shall be delivered in writing, unless it shall immediately follow the hearing, in which case it shall be delivered orally and thereafter in writing, with copies to all parties. Each decision and order shall be accompanied by findings of fact, conclusions of law, and specific disposition of the case and shall be provided to the individual. Formal action of the Board shall be taken publicly at a Board meeting following the hearing, but no other information will be released by the Board or school administration as noted above.

SPECIAL SECTION ON SCHOOL BOARDS

SCHOOL BOARDS: OPEN MEETING LAW

The Attorney General has recently issued Opinion No. 76-334 (November 15, 1976), wherein the following question was asked:

> "Other than the board members of a local school board, who should be present at a closed executive meeting when a discussion on re-hiring school teachers, staff or administration takes place, especially when witnesses are to be called?"

The Attorney General answered as follows:

> "Under 25 O.S. 1971, §§ 201, a local school board can meet in executive session to discuss on an individual basis the rehiring of a school teacher, staff member or administrator; however, it cannot in executive session, conduct any evidentiary due process hearing, such as provided for in 70 O.S. Supp. 1976, §§ 6-103 and 6-122, or otherwise hear testimony of witnesses.
>
> A local school board has discretion to select those persons which it desires to be present at a lawful executive session, and the decision as to who should be present is within the sound discretion of the board exercised in a reasonable manner based on the facts and circumstances in each instance."

Section 201 was recently amended by the Oklahoma Legislature and accordingly, there are now four basic exceptions to Oklahoma's "Open Meeting" Law:

1. Discussion of employment on an individual basis;
2. Student disciplinary hearings, if agreed to by all proper parties (the deliberation stage continues to be authorized for executive session);
3. Conference with legal counsel as to pending or impending litigation;
4. Discussion of procedural and tactical negotiation matters.

It is important to remember that the privilege of "executive session" remains that of the Board (subject of course to the provisions and exceptions of Section 201). The Board, therefore, is privileged to "open" any such executive session to whoever the Board chooses and further, to restrict admittance at their option, again assuming that there does exist an "exception" upon which the Board can rely.

Committees of the Board are not subject to the provisions of Section 201 unless they have final decision making authority. This would be true even if Board members are members of such a committee, but caution should be taken in assigning a quorum of the Board to any one committee.

Oklahoma law now requires that a school district board of education provide advance notice of a board meeting. Title 70, O.S. §§5-118 required only that the "regular" meeting of each board be held on the first Monday of each month, or upon such day as may be fixed by the board (it has been assumed that if another day is utilized, then the board must abide by that particular day, at least during the organized year). House Bill 1416, requires all public bodies to give advance notice for all regular meetings, special meetings, reconvened meetings and emergency meetings. A Schedule of the regular meetings could be filed in advance, but any subsequent change would require a 10 days notice. Notice of a special meeting would have to be filed 48 hours prior to the meeting and "reasonable" notice would be required for emergency meetings. The filing "place" for school districts would be the county clerk. The time and place of a reconvened meeting would have to be given at the original meeting and only matters appearing on the agenda of the original meeting could be considered. Every school district should already have an approved rule providing advance notice of special board meetings and if the board meets on any day other than the first Monday, publication of the selected day should be mandatory. Section 5-118 is the implied authority for such a rule, but the Legislature has now "pre-empted the field".

SCHOOL BOARDS: THE "MINORITY BLOC"

The case of Wood v. Strickland, 95 S.Ct. 992 (1975) established the premise of "qualified immunity" with respect to the individual actions or inactions of individual school officials, including school board members. The Court indicated that in order to "qualify" for immunity, "the official must himself be acting sincerely and with the belief that what he is doing is right."

The construing Oklahoma's "Nepotism Law", the Attorney General, in an opinion issued August 26, 1950, held that two members of a board of education could not employ a relative of a third member of the board, regardless of whether said third member votes for such employment. Both the nepotism law (Title 21, O.S. §§ 481) and an "interested in contract" prohibition (Title 70, O.S. §§ 5-125), however, specifically place such a prohibition upon the board member who either votes in favor of such action or assents to it with knowledge of the relationship or interest.

The general rule has always been that the majority rules. Further, even though an individual board member has the right to abstain from voting, this does not count as a dissent, but rather, counts as an assent to the action or inaction of the majority. What rights, if any, does the so-called "minority bloc" on the board have in respect to individual liability? In analyzing this question, we must first consider the classification of actions under which the question might arise.

The first type of action is the alleged illegal expenditure. It is clear that a vote against an illegal expenditure would protect that individual board member to some degree. The board member who has knowledge of such action, could not sit idly by and permit such board action to be taken. To acquiesce is to accept quietly without protesting. Accordingly, the individual might be bound, in order to protect his own interests, to take affirmative action of some sort, against the majority. As an individual, the board member continues to be a

taxpaying patron of the community and as such, maintains all rights accorded the taxpayer to exercise those options provided by law (see Title 70, O.S. §§ 5-126).

The second type of action is one typified by Wood v. Strickland. The school board member is not entitled to immunity from liability for damages if he knew or reasonably should have known that the action taken would violate the constitutional rights of a student or school district employee. It would appear that a vote against such action would protect the individual board member from liability without further action on his part.

A board of education speaks officially through its minutes. Any dissent, accordingly, should be reflected in the minutes to assure a proper record is maintained including any minority opinion.

A board of education must depend upon recommendations of administrative officials. A board cannot afford to act "blindly". Additionally, a board member cannot by expected a avoid every issue presented to the board by simply voting "no". Nonfeasance in office is the failure to do what duty requires to be done. The handling of public affairs is a burden of great responsibility and an intelligent vote avoids the possibility of misconduct or wrongdoing while in office.

SCHOOL BOARDS: IMPARTIALITY

A number of teachers brought suit, on behalf of the Hortonville Education Association, against the Hortonville School District, alleging a violation of the due process clause of the Fourteenth Amendment of the United States Constitution. The petition stated that, subsequent to a strike by members of the teachers union in direct violation of Wisconsin law, the board of education conducted disciplinary hearings for each of the teachers on strike, and dismissed them. Plaintiffs argued that the due process clause of the Fourteenth Amendment requires an independent and unbiased decision maker, and that the board of education was not sufficiently impartial to exercise discipline over the striking teachers.

The trial court rejected the teachers claim that they were denied due process. The teachers had admitted that they (1) were on strike; (2) received adequated notice, including a warning that they were in violation of Wisconsin law; and (3) were afforded a hearing. On appeal, the Wisconsin Supreme Court reversed and held the board of education was in fact partial, and it had available other remedies aside from dismissal, including an injunction prohibiting the strike and a call for mediation or continued bargaining. The court specifically stated, "(i)t would seem essential even in cases of undisputed or stipulated facts, that an impartial decision maker by charged with the responsibility of determining what action shall be taken on the basis of those facts." 225 N.W. 2d 658, 671 (Wis. 1975)

The United States Supreme Court granted certiorari because of the state court's reliance on federal due process. It reversed the Wisconsin decision (96 S. Ct. 1 (1975)) holding that the due process clause of the Fourteenth Amendment would be made or reviewed by a body other than the school board.

The Supreme Court cited the Wisconsin law which empowered the board of education as the only body vested by statute with the power to employ and dismiss teachers, and gave the board broad power over the possession, care, control and management of the property and affairs of the school district. Moreover, the Supreme Court concluded that participation in negotiations was a statutory duty of the board and mere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not necessarily disqualify a decision maker. A decision maker is not disqualified simply because it has taken the position, even in public, on a policy issue related to the dispute, in the absence of a showing that it is not capable of judging a particular controversy fairly on the basis of its own circumstances. The Supreme Court determined that the Wisconsin state legislature in giving the board the power to employ and dismiss teachers and permitting it to determine the question at issue, preserves such control over school district affairs, leaves the balance of power in labor relations where the state legislature struck it and assures that the decision whether to dismiss the teachers will be made by the body responsible for that decision under state law. It was further noted that there is a presumption of honesty and integrity in policy makers with decision making power.

In a dissent by Justices Stewart, Brennen and Marshall, a remand to the Wisconsin court was suggested as they had concluded that the school board in this instance, was not impartial. In addition, the state court should determine any conflict between the governance of discharging striking teachers and the school district's participation in negotiation procedures.

"Shades of Hortenville": The Jon Tom Staton Case

On the 15th day of February, 1977, the Tenth Circuit Court of Appeals, in the case of Staton V. Mayes, et al., No. 75-1332 (appeal from the U.S. District Court for the Eastern District of Oklahoma), reversed the lower Court decision, which had found in favor of the Board of Education in its determination

to dismiss Superintendent Staton, holding that the Board of Education had violated the "impartial tribunal" doctrine.

This desicion appears contra to the 1976 U.S. Supreme Court determination in Hortenville Joint School District No. 1, et al. v. Hortonville Education Association, et al., U.S. , 96 S.Ct. 2308 (1976). In Hortenville, a number of teachers sued a Wisconsin School District, alleging a violation of the due process clause of the Fourteenth Amendment, in that subsequent to a strike by members of the teachers' union, in direct violation of Wisconsin law, the board of education conducted disciplinary hearings for each of the teachers on strike, and dismissed them.

The teachers' argument that the board was a biased decision-maker and accordingly, was not sufficiently "impartial" to conduct such hearings, was duly noted, but the Court held that the decision whether to dismiss the teachers must be made by the body responsible for that decision under state law, i.e. the board of education. The Court further noted that there is a presumption of honesty and integrity in policy makers with decision making power.

The facts in the Staton case were somewhat different, but the legal issue was the same. Prior to the annual school board election, Superintendent Staton had enjoyed a narrow margin of support from the board, i.e. three votes to two. After the election, there had been a change in one office on the Board and the narrow margin of support changed to a narrow margin of non-support, i.e. two votes to three. The new board member had specifically campaigned to vote for a new Superintendent. Immediately after his "seating", the board did in fact, vote a proposed dismissal and a hearing was held pursuant to the provisions of Title 70, O.S. §§ 6-103, with the board of education sitting in judgment on the question of dismissal. The board voted (3-2) to dismiss Superintendent Staton.

At the time of this particular action (February, 1973), a certificated person, who had been terminated pursuant to Section 6-103, had no further remedies

as provided by law. The decision of the local board was final (in 1974, the Oklahoma State Legislature amended Section 6-103 providing administrative appeals for the tenured teacher).

Superintendent Staton filed an administrative appeal which was rejected upon jurisdictional grounds. Subsequently, he filed a civil rights suit challenging his dismissal and after an evidentiary hearing the trial court rejected the constitutional claims and dismissed the action.

Although the Hortonville case was not deicded until after Superintendent Staton had lodged his appeal, the Circuit Court discussed the case in its opinion. The Court attempted to distinguish Hortonville by saying that the campaign "promises" were not mere statements on a policy issue related to the dispute, leaving the decision maker capable of judging a particular controversy fairly on the basis of its own circumstances; nor was there simply a case of the instigation of charges and a statement of them during an investigatory phase by the body that will later decide the merits of the charges. The Court indicated that in Hortenville, the facts were admitted, while in Staton, they were not.

The Court also determined that Section 6-103, at the particular time in question, was unconstitutional, but the present statute could remedy any partiality that may have existed at the hearing in question. Accordingly, the Court seems to be saying that the whole matter should be repeated inasmuch as the state statute now provides for appellate relief.

The dissent in Staton cited Brinkley V. Hassig, 83 F.2d 351 (10th Cir. 1936) which laid down the so-called "rule of necessity". This rule essentially says that the very necessity of the case has created the rule that disqualification will not be permitted to destroy the only tribunal with power in the premises. Findings of administrative tribunals cannot be overturned as long as the decision is reached from a consideration of substantial evidence produced at the hearing. Brinkley then stands for the proposition that the type of bias or prejudice

attributed to the three board members in the Staton case, is not such as to disqualify them from hearing the matter. Obviously, in this case, there was no other "tribunal" authorized by law to determine the matter. Simply because additional remedies now exist should form no basis for reversal of a case which occured four years previously.

The dissent concludes by setting out two premises of determination: (1) was procedural due process accorded, and (2) was the dismissal justified on the merits based on substantial evidence.

In Hortonville, the same board of education which was heavily involved in the negotiations process during which the teachers determined to strike, was the board which sat in judgment as to those teachers' continued employment. Both authorities were justified specifically by law. In Staton, the same board "majority" which had previously indicated disagreement with the Superintendent's performance was the board which sat in judgment as to his continued employment.

Can one really and honestly distinguish between the two?

SCHOOL BOARDS: INDIVIDUAL LIABILITY

One could not approach the topic of legal liability of individual board members without referring initially to the case of Wood V. Strickland, 95 S.Ct. 992 (1975). If one reviews the "headnotes" of Wood, he finds the following:

1. It is not the role of the Federal Courts to set aside decisions of school administrators which the Court may view as lacking in a basis in wisdom or compassion.

2. Public high school students have substantive and procedural rights while at school.

3. The Civil Rights Act does not extend the right to relitigate in Federal Court, evidentiary questions arising in school disciplinary proceedings, or the proper construction of school regulations, and is not intended to be a vehicle for Federal Court correction of errors in the exercise of school official's discretion, that do not rise to the level of violations of specific constitutional guarantees.

4. Public shcool officials must have a degree of immunity from damage suits under the Civil Rights Act if the work of the schools is to go forward; and, however worded, the immunity must be such that school officials understand that action taken in the good faith fulfillment of their responsibilities and within the bounds of reason under all the circumstances, will not be punished and that they need not exercise their discretion with undue timidity.

5. In respect to the immunity of school administrators and school board members from awards of damages under the Civil Rights Act, the appropriate standard necessarily contains both "objective" and "subjective" elements; the official must himself be acting sincerely and with belief that what he is doing is right; but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law, on the part of one entrusted with the supervision of students' daily lives, than by the presence of actual malice.

6. To be entitled to a special exemption from the categorical remedial language of the Civil Rights Act in a case in which his action has violated a student's constitutional rights, a school board member who has voluntarily undertaken the task of supervising the operation of the school and the activites of the students, must be held to a standard of conduct based not only on permissable intentions, but also on the knowledge of the basic unquestioned constitutional rights of his charges.

7. While on the basis of common law tradition and public policy, school officials are entitled to a qualified good faith immunity from liability for damages under the Civil Rights Act; they are not, however, immune from such liability if they knew or reasonably should have known that the action they took within their sphere of official responsibility

> would violate the constitutional rights of the student affected; or if they took the action with malicious intent to cause a deprivation of such rights or other injury to the student; a compensatory award is appropriate only if the officials acted with such an impermissable motivation or with such disregard of students' clearly established constitutional rights that their action could not reasonably be characterized as in good faith.

What has happened since Strickland? It has been the general consensus by most courts that school boards are not "persons" within the statute providing, that every person who under color of state law subjects one to deprivation of rights, shall be liable to the party injured, see 42 USCA, Section 1983, 28 USCA, Sections 1343, 1343(3), Atkins V. Duvall County School Board, 511 F.2d (CA Fla. 1975). Obviously, such determination leaves those individuals serving on a school board or in their respective school official capacity, as standing alone, Independent School District 612, 509 F.2d 1062 (CA Minn. 1975) the Eleventh Amendment was discussed and the court held:

> "Although states are given immunity by Eleventh Amendment from prosecution of civil claims, individuals and associations acting under color of state law are not immune to sanctions of the Civil Rights Act and may be sued, unless it is clear that the claim is actually a ruse by which personal jurisdiction over the state is sought to be exercised."

Essentially, this Minnesota decision held that a school district was in fact a "person" within the purview of 42 USCA, Section 1983.

The Supreme Court denied certiorari in the Florida case, Daye v. Bounds, 509 F.2d 66, Cert. Den. 95 S.Ct. 2404, wherein the Circuit Court held that a state was not a "person" within the Federal Civil Rights statute proscribing the deprivation of rights. Oklahoma and the Tenth Circuit Court have held with Florida that a municipal corporation is not a "person" within the contemplation of Sections 1983 and 1985, governing conspiratorial and substantive civil rights offenses, see Shadid V. Oklahoma City, 494 F.2d 1267 (CA Okl. 1974). In further support of the Florida decision, see Patton V. Conrad Area School District, 388 F.Supp. 410 (DC Del. 1975) and State of Louisiana Ex Rel Purkey V. Ciolino,

393 F. Supp. 102 (DC La. 1975) and Booth V. Prince Georges County Maryland, 66 FRD 466 (DC Ma. 1975).

A case in New York held that a suit could be brought against public officials to enjoin them from invading constitutional rights, see Bouffeir v. Frank, 389 F.Supp. 502 (DC N.Y. 1975). Conversely, in Sullivan v. Mead County Independent School District No. 101, 387 F. Supp. 1237 (DCSD 1975) the Court held that a school district was not a "person" within the Civil Rights Act and that a teacher could not maintain an action under the act against the school district for declaratory and injunctive relief as to her dismissal. The Court did say, however, that individual members of the board of education were subject to suit under the Civil Rights Act in an action challenging the dismissal of the teacher. The question then is raised as to whether, if individuals are sued for injunctive relief, for example " reinstatement," the Court could order individual members of the board to reinstate a teacher since, typically, individual members of the board have no power or authority, except in session as an official board of education; see also Wright v. Houston Independent School District, 393 F.Supp. 1149 (DC Tex. 1975). Texas, by the way, typically follows the premise that a school district is not a "person" within the meaning of the Civil Rights statutes, see Harkless v. Sweeney Independent School District, 388 F.Supp. 738 (DC Tex. 1975).

In conclusion, I might relate to you a case that this attorney defended, Fanning v. The School Board of Independent School District No. 23, 395 F.Supp. 18 (USCD WD. Okl. 1975). A non-tenured teacher who was non-renewed, brought a civil rights action against the school board and two administrators. The Federal District Court refused to hear the case on the theory of abstention since no Federal questions were involved. The Court did make several comments which are worthy of note. One issue was whether a decision of the school board not to renew a non-tenured teacher's contract based on the recommendations of school

administrators, deprived the teacher of rights arising under Federal law if the administrators were improperly motivated. The Court answered this question as follows:

> "First, the administrators while cloaked with only some degree of immunity are not members of the school board. They have only the power to recommend and not the power to decide. The fact that the board scrutinizes these recommendations is in itself a safeguard of plaintiff's rights. The distinct power of the administrator to submit an adverse recommendation has always been recognized as the zenith of discretion, which is why it is merely a recommendation. If the board has not renewed a contract because of the administrator's recommendation which is based on an impermissable intent, then the primary failure is that of the board in not doing what it was established to do, so only the board has the power to decide on continuing employment."

Additionally, the Court said:

> "The individual board member's actions must be based on permissable intentions and on the knowledge of the basic and unquestioned constitutional rights of those whom the member affects in his official capacity."

Obviously, one can read into this decision, the premise of Wood v. Strickland.

The problem appears to be school officials being subject to such liability award, i.e., the prospect thereof, as opposed to actual proof to substantiate the premise of malicious intent. It is my supposition that Wood v. Strickland, as opposed to being the lawyer's "full employment" case could be termed the insurance company's "full employment" case.

SCHOOL BOARDS: THE SUMMONS

(this article is a reprint of one of the author's most popular lectures, originally presented in 1974)

Once the summons has been served, it is too late to backtrack and attempt to "patch up" old wounds. A case in point is where a Board of Trustees fired an institutional President for cause, but when challenged by a lawsuit for damages, attempted to backtrack and gather evidence to support the dismissal. Predictably, the Court refused to consider any evidence that was discovered subsequent to the firing and the ex-president left Court with a substantial damage award.

While lecturing and speaking to various groups composed of educators and administrators, I continually stress the importance of the concept of "preventive litigation."

A system of "preventive litigation" is imperative as a much preferred alternative to "panic" when the Sheriff appears with service of summons.

Organizations such as the American Civil Liberties Union, the American Association of University Professors and numerous State Education Associations, have worked diligently and thoroughly the past few years and have accomplished much in communicating their ideas and philosophies to the Courts and to the Legislatures. School board organizations, although slow to leave the starting gate, are now beginning to regroup and fight for their particular rights, which are, in the final analysis, the rights of the communities which the school boards serve.

There is no question about it....teachers, students and women today are increasingly more willing to challenge questionable practices by school authorities. Accordingly, each and every school board member and administrator must be prepared for the eventual onslaught. Let me assure you that no school board is immune from challenge. The practice of "preventive litigation" is a necessity.

"Preventive litigation" involves a few simple points"

1. The promulgation of a sound set of updated, reasonable, and relevant rules and regulations;

2. The preservation of all documentation in an orderly fashion, i.e. evaluations, reports, minutes, resolutions, etc.;

3. Membership in an organization designed to further the interests of school board members and administrators with respect to the competent and efficient operation of the public schools;

4. Continued retention of an accountant and an attorney competent in the field of school law.

School boards tend to become complacent and hesitate to earnestly work at "preventive litigation." As a school administrator once told me, "If we ever get sued, you'll sure be the first one we call." Is it not best to avoid being sued; or, at least, be fully and adequately prepared to defend the suit?

There is actually no way to prevent a suit being filed regardless of the extent to which a district has done its homework. Certainly, upon a reasonable investigation, a complaining party may well determine that litigation would be fruitless once discovering the facts and supporting documentation on file with the school district. School districts however, will continue to be sued, both in Federal and State Courts, and before certain administrative agencies. The best way, though, to remove the guts of a plaintiff's lawsuit is to begin with a reasonable and justifiable regulation on the books upon which the school board's action was based. For a school board to act without written authority is to reduce the possibility of successful litigation from the board's viewpoint. Further, even though a regulation may be in existence, its application must be carefully evaluated in that it might have been utilized in a discriminatory manner and/or applied in a selective fashion.

Many lawsuits are threatened, but few are filed. If confronted with the possibility of a lawsuit, however, the board attorney should be immediately contacted and authorized to assume the leading role in communications. Do not wait until the damage is beyond repair and then expect your attorney to perform miracles.

Once a lawsuit has been filed and the school district served, all communication as to the subject matter of such lawsuit should cease on the part of school district officers and personnel, except at the specific direction of the school board attorney. In any lawsuit, initial efforts are conducted in an effort to resolve or settle the matter and thereby avoid an actual trial in a court of law. The negotiation should be done prior to the filing of the lawsuit; if these negotiations are unsuccessful, the chances of settlement after the filing are usually rare. A great deal of litigation can be avoided by providing a forum for those who have grievances which they desire to state to the governing authority. If such a forum is not provided, then the grievance may well become grounds for a lawsuit.

If money damages are involved in a lawsuit, then the case will be tried before a jury. If only equitable relief is being asked, then the Judge alone will hear the case and render a determination. Once the decision has been rendered, then appellate remedies become available and appeals may be lodged by the losing party and procedures change. Legal issues are brought to the forefront and the appellate bodies are asked to review the initial decision as to its correctness based upon the facts introduced and the law applied. Accordingly, litigation may take an extended period of time. Meanwhile, school business must proceed in an orderly fashion whithout constant awareness of the pending legal proceedings.

Complications have arisen with respect to the forum in which a school district is sued. It is popular, when filing a lawsuit, to sue not only the board of education of a school district, its chief executive officer and applicable personnel, but also to sue each and all of then on an individual basis. It has been specifically ruled that in civil rights actions, a school district, because it is in the nature of a municipality, cannot be held liable for either damages or equitable relief; but the individual members thereof can be so held and

accordingly, their interests must be protected. Generally, most jurisdictions authorize liability insurance to protect the individual members of the board as well as the individual members of the administrative staff. If such insurance is in force, the insurer will provide legal counsel for each insured to participate in the proceedings along with the retained board attorney. It is important to insure that when individuals are sued along with the district, that counsel be retained for both interests, as oftentimes these interests may be in conflict.

Practical politics can be extremely important to the administrator who desires to avoid the courtroom. His day-to-day dealings with parents, teachers, students and others are important in terms of avoiding conflict and possible Court action. An image of "square dealing" and "critical concern" should be developed. If you make the dissident or litigant actually believe he has been dealt with fairly, he probably will not choose to go to court. This is actually what due process is all about. A little extra time and effort will, in the long run, save you and your school consideration anquish, time and expense.

Consider the following statement which points out the important need for practical politics:

> We are satisfied that the school authorites have acted with consideration for the rights and feelings of their students and have enacted their codes, including the ones in question here, in the best interests of the educational process. A court might disagree with their professional judgment, but it should not take over the operation of their schools.

All school district personnel should be required to attend legal briefings conducted by the school board attorney. The majority of incidents that occur upon school grounds directly involve the teacher. The teacher's action or inaction with respect to an incident is often the basis of a subsequent lawsuit. It is the administration's responsibility to assure that all teaching and staff personnel are adequately briefed as to the legality of their activities. Further, school board members should be briefed and adequately advised prior to taking action

as to any particular matter within their jurisdiction.

In conclusion, when your board has been sued, hopefully you have done your homework and are adequately prepared to defend the lawsuit in an effective and efficient manner. There is no way to prevent litigation, other than relying on preventive litigation and practical politics.

The courts prefer to leave the operation of the schools to the professionals who are trained to operate them. The ultimate authority for determining the validity and propriety of school administration actions, or non-actions, rests with the people whom the administration serves, and not the judiciary. The Courts are currently responding as is indicated by the following:

> 1976, the Bicentennial Year, was a big year for the United State Supreme Court, which seemed to be interested in returning some of the power to states and their local units which had eroded under the free-wheeling Warren Court. Eight of the decisions directly affect school management.

1. Pasadena City Board of Education v. Spangler. June 28. Held: once desegregation is achieved, there is no duty to make year-by-year adjustments of the racial composition of student bodies. (6-2).

2. Runyon v. McCrary, June 25. Held: (7-2) Sec. 1981 prohibits private, commercially operated, nonsectarian schools from denying admission to prospective students because they are blacks.

3. Hortonville Educ. Ass'n v. Hortonville School Dist, June 17. Held: (6-3) that the school board may dismiss teachers who strike in violation of state law.

4. Washington v. Davis, June 7. Held: (6-3) an employment test was upheld which had the effect of eliminating racial minorities from becoming policemen in the District of Columbia.

5. National League of Cities v. Usery, June 24. Held: (5-4) the Fair Labor Standards Act may not be extended to state employees (prospects of a federal collective bargaining act for state and local governmental employees are now dead).

6. Roemer v. Bd. of Public Works of Maryland, June 21, Held: (5-4) upheld a statute which in Maryland provides state aid to private colleges and universities.

7. Bishop v. Wood, June 10. Held: (5-4) public employees who serve "at the pleasure of the board" do not gain a "property" interest in their jobs and a discharged employee may not claim, in the absence of proof, that his good name is impaired if the reasons for dismissal are not publicly disclosed.

8. McCarthy v. Phila. Services Commission, June 7. Held: (per curiam) upheld a Philadelphia municipal regulation requiring city employees to reside in the city. (There is no reason to believe that the Court would have ruled differently had the plaintiff been a school employee rather than a fireman.)

In addition to the eight decisions above, several other significant actions affecting schools should be noted.

A. Drew Municipal Separate School District v. Andrews, May 3. Dismissed a writ of certiorari it had previously granted, letting stand the lower court's declaration that a Mississippi school board's rule against hiring parents of illegitimate children was unconstitutional. The State had shown no rational relationship between its rule and the legitimate educational objectives of the school board.

B. Kelley v. Johnson, April 5. Held: a New York county police department's regulation limiting the length of a policeman's hair, sideburns, and mustache did not violate the Fourteenth Amendment. A desire to make policemen easier to recognize and to foster esprit de corps was held to justify the grooming rules.

C. Mass. Bd. of Retirement v. Murgia, June 25. Held: mandatory retirement age of 50 for uniformed state police has a rational relationship to maintaining a physically fit police force. Fitzpatrick v. Bitzner, June 28. Held: back pay is due on retirement in a sex discrimination suit (Title VII penalty clause not unconstitutional).

THE SCHOOL ATTORNEY: PART I

A goal of any school board attorney would be to assist you, the school administrator, in administering your school district in a fair and just manner without court interference to the benefit and betterment of the community in which you serve. Essentially, a disceration on "The Role of a School Board Attorney" or "What to do When You are Sued" or "Servicing your School District Client," should be considered to be somewhat of a self serving declaration. Regardless, as your role as an administrator has changed significantly over the past ten to twenty years, so has the role of the school board attorney. No longer are his services limited to the drafting of a contract or lease, but rather, the services that you should expect of your local school board attorney requires the skills of a specialist. Although the American Bar Association and local bar associations have for years resisted "specialization," (although now they are looking into the matter on a very restricted basis) we lawyers are just as specialized as our colleagues in the medical prefession. We have tax lawyers, workman's compensation lawyers, admiralty lawyers, patent lawyers, collection lawyers amongst others, and now, we have school lawyers, a field which has come into its own since the Supreme Court decision of 20 years ago, Brown V. Board of Education.

School law continues to be a restricted field of endeavor as very few attorneys practice exclusively the law of public education. For example, the most recent membership director of the Council of School Attorneys, which is a subsidiary of the National School Boards Association, lists 250 attorneys. I would venture to say that out of those 250, at least 90% represent just one school board which is typically their own local school board. These attorneys, however, by virtue of their membership in the Council of School Attorneys, as well as membership in such organizations as NOLPE and the local government section of the American Bar Association, are serious about school litigation and determined

to provide competent legal representation to their school district client. The competent school board attorney must be sought out, as he is a critical source element for the school administrator.

One can only properly examine the role of the school board attorney by examining the role of the school administrator. Regardless of the size of your particular school district, we all have common problems. It is simple to say that the success of any one individual wholly depends upon the people surrounding him. This is true of any type of endeavor. The retail store owner cannot do it all; he must have some top-notch salesman to assure his success. This is true of the school administrator. His success depends upon his administrators, architects, accountants, contractors, negotiation consultants and attorneys. He must learn to utilize his sources of expertise and continually have them on-call to insure that problems are handled efficiently and effectively. The administrator today must educate and inform his board of education as to the needs of the school district. He must indicate to his board the complexities and realities of operating a school system. He must request the authority to seek out the necessary expertise to enable him to do the type of job his board is expecting of him.

I have long emphasized the doctrine of preventive litigation. This involves four important points:

1. The promulgation of a sound set of updated reasonable and relevant rules and regulations;

2. The preservation of all documentation in an orderly fashion;

3. Membership in organization designed to further the interest and goals of school baords and administrators with respect to the competent and efficient operation of their school system;

4. The continued retention of competent expertise, including, but not limited to, accountants, architects, attorneys, etc.

It is not difficult to operate a school system which would be one, the courts preferred <u>not</u> to delve into. Our courts have been, and continue to be,

of the opinion, that once school authorities have acted with due consideration of the rights of students, teachers and staff, and if the enacting of codes, rules and regulations are in the best interests of the educational process, the judicial system prefers to leave the operation of the schools to the professionals who are trained to do just that. When you do this you are assured of five basic rights:

1. School authorities have the right to operate their school system in a fair and just manner without judicial intervention;

2. School authorities have the right to confer and negotiate with teachers, students and parents;

3. School authorities have the right to determine operation and procedural guidelines subject to statutory edicts;

4. School authorities have the right to exercise their discretion and professional judgment with respect to the enactment of policy;

5. School authorities have the right to expect full, complete cooperation and assistance from members of the community, as well as those persons responsible directly to the board of education.

Essentially, our goals are the same today as they were twenty years ago; the only thing changed is the procedure implemented to attain those goals. As an administrator, you must be responsive to a number of elements within the educational process, to-wit, the student, teacher, parent, patron, staff, etc. You are clearly the gear in the wheel of education and to enable that wheel to keep turning, you must administer your operation with competence, regardless of your budget and regardless of your location, whether it be urban or rural. A number of rural school operations have now become urban operations or at least suburban-type operations. Accordingly, they have had to face different types of problems. We have seen the unbelievable input of federal financing and have had to comply with the federal edict to assure continued supply of this money. Each year state legislatures pass new and complex laws relative to the operation of a school system and it is going to get worse before it gets better! So seek out your experts.

In conclusion, the role of the school board attorney is directly related to the role of the school administrator; upon reading a recent publication by Bob Phay, Past President of NOPLE, who works out of the Institute of Government at North Carolina, Bob indicated that the authors of this particular publication were trained in the law and not school administration. Accordingly, their various drafts were fed through a number of school administrators to garner their input, criticisms, suggestions, recommendations, etc., in hopes that the final product would be one which would be workable, yet legal. Those of us who are trained in the law and not trained in school administration must rely upon you, the school administrator, for the input, the policy, the facts. A usual question is, can we do this? An appropriate answer is, what is your policy or what have you done in the past? Your particular school system prefers to operate in a certain manner and once this is determined, we can attempt to develop a procedure within the limits of the law.

THE SCHOOL ATTORNEY: PART II

> "The Board recognizes that the increasing complexity of school district operations frequently requires procurement of professional legal services."

To say that the foregoing preamble to a school board policy is an understatement is to say that any board without the benefit of legal counsel provokes untold risk. Just the retention of legal counsel, however, is no longer enough. the most competent, qualified and experienced school attorney must be sought and retained. If such a person is not readily available, then the board should seek out a competent attorney and provide him a proper fee in order that he may develop an expertise in school law.

Attorney Larry D. Bartlett, in his article "The Kind of School Attorney You Should Hire"* stated that "School boards, in most instances, should engage a law firm--not a lone lawyer". Mr. Bartlett goes on to contradict himself somewhat, however, by stating, "When searching for a lawyer to represent your school district, try to hire someone with practical experience in school law". Obviously, the preferred situation would be a law firm which specializes in school law, and there are a few!

A school law specialist remains a rare commodity today, although the numbers are increasing. With the advent of a number of state associations of school attorneys, several of which have affiliated with the NSBA Council of School Attorneys, the Council now lists some 500 members.** In your search for a competent and experienced school attorney, your sources are many. They would include your State Bar Association, State School Boards Association, State Department of Education or the NSBA Council.

The judicial system has its own way of advising the prospective litigant

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* American School Board Journal (May, 1976).

** Council of School Attorneys 1976-77 Membership Directory

as to the sins of non-representation. In Wood v. Strickland*, the U.S. Supreme Court admonished boards of education to be knowledgeable of known constitutional rights. The school board, therefore, can ill afford not to demand both effective and efficient representation by its attorney.

There must be a close working relationship between the school attorney and the board. This relationship should be directed through the school's chief administrative officer. The school attorney cannot be expected to effectively and efficiently work with five to seven or more individuals who comprise the board. Other problems would result from any dissenting members as to school board action.

Not only should the school attorney review all school regulations and assist in drafting new policies, but he must be prepared to initiate recommendations. Further, the school attorney should be expected to conduct in-service briefings to the instructional and administrative staffs.

It is not necessary for the school attorney to attend all school board meetings. If your attorney is considered an expert in the field, he may well have additional school clients, many of which will meet at the same time. As an alternative, your attorney should be provided a copy of the board agenda in advance. He can then research the problem areas and report to the Chief Administrative Officer prior to the Board meeting. Any problems which arise during the course of the meeting can be discussed with the attorney afterwards. Obviously, a board should not take action until there has been time for investigation, research and a written recommendation. Pending litigation reports can be submitted to the board concurrently with other reports and documents.

In conclusion, a school attorney must involve himself in the decision-making process of the board. In this context, the attorney should provide the

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* 420 U.S. 308 (1975).

alternatives and assist the Chief Administrative Officer with a recommendation of action, if requested. Because of the continued change in law education, much advice will be nothing more than a "brown bag" interpretation. To be involved in the process, however, is not to make the decision itself. In this regard, the board stands alone.

THE SCHOOL DISTRICT EVALUATION SYSTEM

Senate Bill 249, effective June 7, 1977, provides for a 'mandatory evaluation system" which must be established for each school district prior to October 15, 1977. The following information is printed here in an effort to assist the school district in the organization and implementation of an effecient and effective evaluation system.

In recent years a number of state legislators have seen fit to prescribe certain requirements for the evaluated performance of certified personnel. For example, in 1973 the Kansas legislature passed an act concerning education in public and non-public elementary and secondary schools, which provided for the evaluation of teachers and other school employees. The act essentially requires each school district to promulgate an evaluation program and requires that the program be filed with the State Department of Education. In 1971, the California legislature adopted the Stull Act, which again requires local school districts to develop and adopt guidelines for the evaluation of the professional performance of certificated personnel. Interestingly enough, the Stull Act has been subject to a great deal of litigation since its initial passage because it is alleged to be in conflict with the Winton Act, which is California's "Meet and Confer" law.

Ironically enough, occasions have arisen in which an evaluation system has worked against a school district which developed and implemented the plan in accordance with appropriate school district regulations. What is of critical concern here, is the fact that if a teacher is terminated, then the evaluation documentation on file must substantiate the termination. There is always the tendency to evaluate performance more favorably than is accurate because the evaluator hesitates to be overly critical and sometimes assumes that more positive remarks will result in more positive performance. This may well be the case, but again, if that teacher is eventually terminated, then how can the evaluator

take the stand and testify to the incompetency of that particular teacher when his own evaluation document indicates that he is an above average instructor.

Additionally, there is always the continuing and perplexing problem of what exactly is encompassed in the job description "classroom teacher." Because there is a great deal of variance in the interpretation of the job description, before any school district implements a positive evaluated performance program, they must first define the "classroom teacher" as well as defining the other specific certified positions within their school system, i.e., counselor, librarian, coach, administrator, etc.

Another point which is typically found in evaluation systems in that the non-tenured teacher or otherwise probationary teacher, is evaluated much more systematically and extensively then the tenured teacher. Obviously, the intent is to assure adequate performance prior to the attainment and/or award of tenure. The irony of this situation, however, rests in the fact that under the law as we know it today, the non-tenured teacher may be terminated upon simple notice only, whereas the tenured teacher not only requires notice, but an official statement of cause and an opportunity to be heard at an appropriate school board personnel hearing. Accordingly, it would seem to make sense that as between the two, the evaluated performance system for the tenured teacher must be much more sophisticated and systematically implemented as opposed to the program for the probationary or non-tenured teacher. As a practical matter, the same comprehensive program should probably be made applicable to both the non-tenured and tenured teacher to assure no discrimination.

The problem of causation is a thorn in most administrators' sides. Most state statutes severely limit the area of causation and the statutory terms preclude many viable areas that may support an eventual determination, but cannot be included within the evidentiary proceeding because the particular piece of evidence simply does not fit within the particular statutory cause alleged.

Documentation is an essential point of any evaluated performance system. Admittedly, it is difficult to develop an appropriate and viable evaluation format and it is recommended that any format developed follow the particular job description promulgated for that particular certificated position. For example, an evaluation format for a counselor should not necessarily be identical to format for your sophomore biology teacher. It is important that each certificated person in the school system be evaluated on a regular and systematic basis. This evaluation task can certainly be delegated by the administrator so charged and it is not really a bad idea to have one teacher evaluate another. A fellow classroom teacher may be more accurate and possibly more critical than the supervisor, as the supervisor tends to be positive with his staff because their performance relates directly to the administrator's performance factor.

The certified employee must be classified and identified as to (1) job description, (2) certificated experience, (3) certificated qualifications, (4) building location, (5) continuing education and (6) tenured or non-tenured status. A comprehensive evaluation should be done at least once per quarter. Following the evaluation, an evaluated performance conference must be held between the teacher and the supervisor and a copy of the evaluation provided the teacher and one filed in the teacher's personnel file. Speaking of the teacher's personnel file, that file should be made available to that particular teacher at anytime upon request. The file, however, should not be made available to any other certificated personnel, except in the line of an official function within the school system.

Ideally, the process of termination should occur as follows:

1. The teacher has been evaluated during the course of an academic year.
2. If a definite problem exists which is determined as a matter of fact, prior to the commencement of the spring semester additional evaluations should be conducted as necessary, all of which should be concluded prior to the teacher's immediate supervisor's recommendation to his superior as to continued or discontinued employment.

3. The recommendation should follow the chain of command with each supervisor within that command noting an appropriate endorsement and at his option, having an interview with the teacher with the subordinate's supervisor present.

4. Eventually the recommendation will reach the superintendent's desk at which time he must decide either to forward the recommendation of action or return the recommendation to his subordinates indicating that no action will be taken as to the discontinuation of that teacher's employment for that particular year.

5. Assuming the Superintendent forwards his recommendation to the board of education recommending termination, the board has the prerogative to request additional investigatory procedures and/or interview any or all of the supervisors involved in the proceeding and to conduct additional interviews with the teacher in question in the presence of his immediate supervisors.

6. The board would then act in accordance with the material and documentation before them and any final vote on the matter should be unanimous as to the employment contract itself.

7. In addition to their vote they should move to direct the superintendent to notify the teacher pursuant to the applicable teacher termination laws.

Typically, parents and/or students should not be used in teacher termination proceedings or for information leading up to such a proceeding. If a parent or any other patron of the community has a complaint as to any particular teacher, the complaint should be in written form and filed with the superintendent's office at which time the superintendent shall conduct an investigation, provide his written report to the board of education, with a copy of that report to the patron involved. The report would include further action to be taken if appropriate or a statement to the effect that nothing further will occur as to the complaint. Student complaints should be handled in the same manner. At the time that any complaint is filed by any person against any certificated person, that person should be immediately notified by a copy of the complaint and given the opportunity to respond.

As part of the teacher termination procedure to be formulated pursuant to the state statutes, the school board should document the procedures and further define the various causes. Of course, this information must be

distributed to certificated personnel who are subject to the evaluation program. Each member of the staff must receive a current copy of the rules, regulations and policies of the particular school district in which they are employed. Each person should be required to sign for their copy, and any amendments, changes or additioanl policies passed during the school year should be distributed to each person and a copy of the particular item posted in an appropriate place in the school. Each teacher's lounge should have a bulletin board which the administration can use to post appropriate notes, messages and information that pertain to the staff. The same procedure would be used as to any student lounge or similar space.

Evaluation forms can be developed by a faculty committee appointed and designated to promulgate such documents. In addition, self-evaluation forms should be used as a collateral document. The evaluative performance procedure should be evalulated each academic year to assure update and deletion of obsolete areas and inclusion of new required performance data. Each faculty member should be given the opportunity to evaluate and make recommendations as to any or all school district policies, including those specifically applicable to the student body.

The creation of an evaluation team to assure that the evaluations are carried out effectively, efficiently and in accordance with time requirements is also a good idea. Only the board can adequately and accurately evaluate the performance of the superintendent; only the superintendent or his designated representative can adequately and accurately evaluate the performance of the principals. It is imperative that if a complaint or problem arises with any certificated person, that that person be made aware of that particular complaint or problem immediately and that notification must be documented.

Any time that a school district anticipates that a teacher termination will occur, the school board attorney should be contacted immediately and brought into

the proceedings to assure that the evidence to support the statement of causation is in existence and in fact supports the statement. Preparation of the appropriate notification papers should be the responsibility of the school board attorney to insure full compliance with procedural due process as required by the statutes of the state and the constitution of both the State and the United States. Finally, any time a teacher's continued employment is in question, a conference should be held and resignation suggested. At no time should any notice of non-renewal and/or dismissal be issued until a resignation suggestion has been made and a document signed by the teacher either resigning or refusing to resign. Remember, too, that any resignation must be immediately accepted by the board of education in regular or special session. Any certificated person can withdraw or revoke their resignation up until the time the board has officially accepted it.

Any litigation always has the prospect of settlement. A teacher termination case is no exception. Accordingly, any reasonable settlement offer should be fully investigated and acted upon prior to proceeding with the voluminous number of hearings required under state law. Another item to remember when negotiating contracts is that, basically, any negotiable item can be included in the certificated person's contract if agreed to by both parties. Certain positions within a school system require unique qualifications and performance data. These items may be included within that particular person's contract so long as it does not discriminate against him as opposed to other certificated persons. The employment contract is a useful instrument and it must constantly be considered throughout the evaluated performance procedure implemented.

A school principal today must be cognizant of the certified instructor's employment relationship within the public school district structure. Typically, the immediate superior to the certified instructor, who is responsible for the documentation of evaluations and subsequent recommendations as to re-employment

and/or termination, is the building principal.

An effective principal not only handles complex administrative tasks, but must be capable of assuming the major responsibility for developing and directing a strong and effective evaluation program. Further, he must be prepared, at the appropriate time, to make a recommendation relative to the continued employment of certified personnel. This decision is not one that can be made immediately prior to the spring board of education meeting at which time employment contracts are determined, but rather, evaluation requirements and documentation as to a teacher's performance is a continuing process for which the building principal is responsible.

Obviously the principal must be informed of the legal implications regarding teacher tenure due process and certain constitutioanl principles which have been established by our Federal Courts. It goes without saying that teachers with an established record of competence should not be idlely dismissed. On the other hand, a teacher with an established record of incompetence should not be permitted to continue his employment in the school system. To terminate a teacher, detailed and continous documentation must be accumulated reagrding the teacher's performance.

Statutorily speaking, the principal must be informed as to those state laws which provide rights and remedies relative to certified personnel. Each state varies as to these requirements. Most jurisdictions provide for a probationary period during which the school administrator has an opportunity to observe the performance of the employee. The employee is normally non-tenured and as such, is not entitled to employment, as the tenured teacher would be. This distinction was clearly indicated in the case of Roth V. Board of Regents, wherein the United States Supreme Court clearly distinguished the status of non-tenured and tenured employees.

The purpose of a probationary period is to provide an opportunity for the employer to observe the employee for a reasonable period of time in order to determine the value of that employee's service, and to make a determination as to the awarding of tenure, pursuant to the particular provisions of the state statute involved. If this opportunity is denied the employer any distinction between the probationary employee and the tenured employee is imperceptible.

An often confusing factor relative to the probationary period is the "continuing contract law." Almost without exception, political subdivisions are limited to the expenditure and/or obligation of public monies for a period of the current fiscal year. In the case of certified personnel, because of their unique work period, most states provide constitutional permission to determine employment contracts and thereby obligate public monies prior to the commencement of the ensuing fiscal year. The continuing contract law states that the employee will be automatically re-employed unless notice is provided by a specific date. In actual practice, each employee's contract is determined at some time during the spring semester and if re-employed, a new contract is prepared and executed indicating at minimum, the contract year upon which the employment is based and the appropriate stipend. Some continuing contract provisions are nothing more than "teacher tenure" laws, which, within their scope, provide for a specific period of probation and in addition, provide those procedural due process rights applicable after the probationary period has been served to the satisfaction of the employer.

Many jurisdictions provide for several types of contracts, e.g., administrator, temporary, replacement, duration of need, substitute, extra duty, etc. The principal should closely examine those provisions relating to the type or types of contractual agreements authorized by law. Frequently, a school district will execute a contract providing vested rights as to the parties involved and upon examination, the contract in question will not be one authorized by law.

Further, there are certain duties found within the public school system for which there is no contract requirement, e.g., coaching, band directorships, club sponsorships, security duties, monitoring duties, etc. The contract exists as a workable document and many necessary and appropriate terms should be included. Many school districts prefer to use a "form" contract, which may fail to provide terms of employment that may be acted upon or enforced. A form contract gives the impression that it has not really been reviewed by both parties and may not be considered in an actual controversy, whether it be administrative or court of law. Aside from basic information such as contract salary and increments added for additional services, any publication such as a faculty handbook should be "incorporated by reference" into the contract as well as any other specific rules and regulations. Additionally, there is a distinction between the contract employment year and the contract work year and these particular terms should be clearly indicated in the contract, even though the basic contractual term of employment normally emcompasses the basic fiscal year.

As indicated, the employment status of teachers is normally either probationary (non-tenured) or tenured. A teacher with probationary contractual status is employed for a trial period during which time the district evaluates his performance. The probationary teacher in this sense has minimal job security because he can be terminated at the conclusion of the academic year, if it is determined that such termination is in the best interests of the school district based upon some reasonable justification. The probationary teacher is not ordinarily entitled to any official written statement of cause, nor a hearing or other procedural protections often afforded tenured teachers. Obviously, the "best interests" test is not applicable to the termination of a tenured teacher. The tenured teacher can be dismissed or not renewed only for "cause" pursuant to the applicable tenure statute. All non-certified employees, including,

secretaries and maintenance personnel and specific board appointments, such as attorneys, architects and accountants, serve at the pleasure of the board of education and can be released at the board's discretion since they have no claim to tenure or other guaranteed benefits, terms or conditions of employment. A board of education, however, does have the authority to contract with these employees and upon doing so, the terms of the contract would govern any vested rights which would have accrued.

Generally, a school board's dismissal of a tenured teacher which is supported by substantial evidence cannot be disturbed, Toups V. Authement, 496 F.2d, 700 (5th Cir. 1974). Typically, the "sufficient evidence" test is applicable to the termination of any tenured teacher who challenges her non-renewal or immediate discharge. This is a question of fact to be determined by the local board of education and/or redetermined by a subsequent administrative review board. The test before the courts would be whether or not the determination rendered was in line with the evidence presented. An initial difficulty is always that of establishing proof to support "causation." Most statutory causes defy a logical or reasonable interpretation. Terminology such as incompetency, inefficiency, willful neglect of duty, immorality, insubordination, etc. are extremely difficult to define in their proper perspective relative to the evidence that is available. Initially, the evidence must be classified as to which cause it supports, then the burden of proof is twofold: (1) to establish that the cause alleged is the proper one and is defined as that which the termination supports; and (2) whether or not the evidence presented is sufficient to support that particular cause. Failure to present sufficient evidence will result in reinstatement and the possibility of an award of damages in a court of law. Most of litigation in regard to teacher termination has been as to non-tenured teachers, because under state tenure laws administrative remedies are generally available to the tenured teacher and are not to the non-tenured

teacher. Typical state tenure laws provide appellate administrative procedures, i.e., review of the matter before administrative review boards and proceedings before the State Department of Education or Commissioner of Education. Administrative procedure acts typically provide for a review by the courts of any act of a state agency so court review would be applicable at the point in time. Administrative appellate remedies vary from state to state, but there has been a tendency in recent years to take the determination out of the hands of the local board of education and/or any teacher review panel and place the determination in the hands of a hearing examiner or fact finding committee, subject to review and/or appeal to a local court of law. Non-tenured teachers, however, remain with but one remedy to challenge their termination; and that is the Federal District Court on the basis of a constitutional question, see Powers V. Mancose School District. In such a case, the burden of proof initially is with the teacher to show that they were terminated because they exercised a particular constitutional right, e.g., freedom of speech. Once this is established by the plaintiff-teacher, then the burden of proof shifts to the local board of education to say "no, that is not the reason, this is the reason." Accordingly, one finds that although the local state statute provides that non-tenured teachers are not entitled to official reasons or causes, a suit in Federal District Court would require the local school district to justify the termination. Even then, however, the justification need not meet the stringent requirements of typical tenure statutes, but rather, there must be some justification that would substantiate the so-called "best interests test."

> "The rules of law relating to performance and breach of contracts generally apply to contracts between teachers and school authorities."

This holding, which is found in Consolidated School District No. 4., Bryan County V. Millis, 192 Okl. 687 189 P.2d 183 (1943), emphasizes the importance of contractual construction and contractual authority. It has often been

emphasized that whenever a school district contracts with an employee, then in addition to those rights, privileges and immunities provided by statute, the employee also enjoys contractual vested rights. A recent decision concerning a school principal emphasized this point. The principal had a valid contract as a "principal" for a contract year. The school district decided to relieve the teacher from his principal duties during the course of the year. The Court held that the school district could not do this, except upon just cause, because the principal had a contractual right to perform the duties of a principal for the course of that particular year. Outside of a contract administrative duties are at the discretion of the school district.

Section 6-101 of Title 70 is the authority provided a school district to contract with its certivicated personnel. Sub-section "A" of Section 6-101 provides in part as follows:

> "No person shall be permitted to teach in any school district of the state without a written contract, except as provided herein for substitute teachers and except teachers of classes in adult education. The board of education of each school district, wherein school is expected to be conducted for the ensuing year, shall employ and contract in writing with qualified teachers for and in the name of the district. One copy of the contract shall be filed with the Clerk of the Board of Education and on a copy shall be retained by the teacher, and if the contract is with a dependent school district, one copy shall be filed with the County Superintendent of Schools."

The teacher's contract is the basic document which must be in the Teacher's Personnel File. Upon the determination of any teacher's continued employment with a school district, the first reference source to be consulted is the File. It should be designed and prepared in such a way as to project the administration's recommendation for continued employment.

THE FILE

LEFT SIDE

1. Evaluations
2. Certifications
3. Correspondence
   - A. Notices
   - B. Resignations
   - C. Retirement Cert.
   - D. Miscellaneous
4. Verification Checklist

RIGHT SIDE

1. Application
2. Transcript
3. Interview
4. Oath
5. Contract
6. Special Assignments
7. Record of Assignments
8. Certification of Tenure
9. Leave Record
10. Release Consents

THE RIGHT SIDE:

1. Application. The application must be complete, signed and dated. A copy should always be retained by the school district even after termination of employment.
2. Transcript. An up-dated copy should always be retained in the file. If a teacher attains additional credits, then an updated transcript should be obtained and inserted to replace the old transcript.
3. Interview. The form utilized by the supervisor while interviewing the prospective employee should be filed upon employment.
4. Oath. The oath, as authorized by Title 51, O.S., Section 36.1, must be executed by the employee as a condition of employment. The form is dictated by Section 36.2A and upon execution, a copy should be filed. (Note also that the original oath must be filed with the County Clerk in the County where the school district is located.)
5. The Contract. Inasmuch as a contract must be executed by the teacher each year, then each contract should be filed and all contracts retained. This would provide an immediate source to determine the teacher's employment history with the school system. As has been indicated in previous writings, it is permissible to execute a memorandum indicating school year of employment and salary as an addendum to the original contract as executed by the teacher.
6. Special Assignments. Additionally, there should be prepared a special assignment form so that if the teacher is assigned to additional duties, such as coaching, for which the teacher is to be paid, the special assignment employment form can be inserted. This would be in lieu of including the assignment in the contract because, as indicated previously, any time

a contract is is executed as to a duty of performance, the teacher accrues additional vested contractual rights pursuant to that particular assignment in consideration of the stipend paid.

7. Record of Assignments. Such form should reflect the following:

   (a) Building assigned

   (b) Immediate supervisor

   (c) Grade/subjects taught

   (d) Special assignments administered

   (e) Period so assigned

8. Certification of Tenure. It is recommended that when a teacher has completed three continuous years with the same school district and is re-employed for a fourth year, that as of 1 July of that year, a certification of tenure be executed and issued to the teacher and a copy filed in the teacher's personnel file.

   (A) Computation of Tenure

   For the teacher whose initial contract commences July 1, the computation is easy. For example:

Commencement Date of Contract:	07/ 01/ 72
Date Determination of Contract: 03/01/75	
Convert to beginning and next fiscal year:	07/ 01/ 75
Subtract	00/ 00/ 03*

   *If this number is 3, then renewal employment grants tenure.

   The teacher who commences employment mid-year causes some computation problems. The general rule is that the "number" is "rounded off" to the nearest year.

For example:

Commencement Date of Contract:	10/01/72
Date Determination of Contract: 03/01/75	
Convert	07/01/75
Subtract	9/00/02

Convert "9" months to "1" year and add to "2" which results in "3" years.

Another example:

Commencement Date of Contract:	02/01/73
Date Determination of Contract: 03/01/75	
Convert	07/01/75
Subtract	05/00/02

"5" rounded off to "0" years, therefore you have "2" years and teacher has another year before qualifying.

Would, however, the 5 months count toward tenure, thereby leaving the teacher to qualify some 7 months into the next year. No, because the teacher would have a contract and could not be "not renewed" in the middle of the contract year. Accordingly the 5 months could not count as a full completed contract year.

The problem frequent with substitutes who are given contracts in mid-year once the regular teacher has decided not to return that year. It is not advisable to issue a contract in mid-year. There is only one type of contract authorized under Oklahoma law and that is the "regular-employed" teacher's contract.

Sub-section "C" of Section 6-105 indicates that a substitute who is employed "regularly" must have a written contract. If the substitute is so "employed" then he is no longer a "substitute," but rather is a "regularly employed" teacher.

9. Leave Record. This "form" should reflect leave periods both with and without pay. Does a leave period count as to tenure? For a probationary teacher, any extented leave would not count as appropriate "observation"

time. If, however, the teacher has previously attained tenure, then he will not lose that tenure if on leave because even on leave he remains under contract to the school district.

10. Release consents. At no time should any material in the teacher's personnel file be released to any third party without the teacher's permission. For this purpose, a consent to release form may also be prepared and filed on the right side of the teacher's personnel file. Remember that a teacher's personnel file is not a "public record." The provision of the Privacy Act should be carefully reviewed to assure that the file is not compromised, subjecting the school district to possible liability. All teacher personnel files should be kept under lock and key and an access list prepared and posted. Security is vital to both teacher personnel records and student records.

THE LEFT SIDE:

1. Evaluations. All evaluation documentation should be filed in chronological order.
2. Certifications. Any additional certification attained by the teacher during the course of employment should be filed.
3. Correspondence. This section would consist of copies of letters, notices and miscellaneous correspondence concerning the teacher. Additionally, evidence of retirement would be entered in this section.
4. Verification Checklist. A personnel file verification system should be used so that during contract determination each teacher's personnel file is reviewed and verified. A verification review check off list can be prepared and enclosed in the file system to assure that all materials are there. The verifier should execute the check off sheet upon noting that the file has in fact been verified. The file should be verified in the

teacher's presence to assure the teacher is aware of what it contains and if she desires copies of anything, they can be made.

Closing the File: The file remains the property of the district, although the teacher is entitled to have copies of everything it contains. Upon termination of employment, either voluntary or involuntary, after the appropriate correspondence has been filed, the file should be closed and filed separately with the other files of former employees.

Typically, pursuant to local school board policies, the reemployment of certified personnel occurs at three levels chronologically during the course of the spring semester.

For example, superintendent contracts are normally decided at the first board meeting in January; principal contracts at the first board meeting in February; and teacher contracts the first board Meeting in March. Final action as to any certified employee must occur no later than the first board meeting in April to permit time for the administration to issue an appropriate determinative notice prior to the 10th day of April. The initial proceedings which culminate at these particular board meetings, however, must commence long before the meetings convene.

Much of what will be discussed here is flexible, depending upon the size of the school system involved. Most certainly, the larger the system the more complicated and extensive is the procedure.

Initially, the school administration must identify each certified employee as a member of one of three groups:

1. Critical Group- teachers currently in their third continuous year of employment;
2. Concerned Group-those teachers currently their first or continuous employment;
3. Problem Group- those teachers who have already attained tenure.

The "critical" group is just that, the most critical to be decided in that if a member's contract is renewed for another year, then that member attains tenure and thereafter enjoys all the rights and privileges attached thereto. Those in the "concerned" group are probationary teachers, some of whom may require serious consultation conferences and may require specific contractual requirements if they are in fact renewed for another year. The third group, the "problem" group, is just that. These personnel are the most serious challange if anyone is not to be renewed.

What follows is basically applicable to all teachers, regardless of how they are classified. A continuing and effective evaluation system should have been in process from the very commencement of the school year. No later than the end of January, evaluation summaries and recommendations on each teacher in the school system should be in the hands of the building principal and no later than the end of February, these summaries/recommendations should be in the hands of the District Superintendent. In each evaluation summary, if there is any problem with a particular teacher, "incident data" should be included and summarized as follows;

1. Date/time of the incident;
2. Nature of the incident;
3. Citation of rule, regulation or statute violated;
4. Witness of incident and a copy of a written and signed statement by that witness;
5. Written report reflecting a conference held with the teacher concerning the incident;
6. A notation as to the evaluation reflecting the foregoing information.

If the problem is serious enough to warrant a recommendation of termination by the principal, then he should consult immediately with the superin-

tendent and a resignation/termination conference set up with the teacher prior to any recommendation being made to the board of education. At this conference, all information should be made available to the teacher and either a conciliation reached or a resignation requested. Any resignation must be in writing and delivered to the chief administrative officer/board of education by registered certified mail. For those first and second year teachers who are to be reemployed upon certain conditions, a reemployment conference should be held between the teacher and the particular administrator concerned.

At no time should a recommendation of termination be forwarded to the board of education unless two (2) conferences with the teacher have been held, i.e., one with the principal and one with the superintendent and principal. At no time should a teacher meet in conference with the board of education prior to the exhaustion of all administrative procedures. If the teacher then desires to meet with the board of education, certainly that teacher may be permitted to do so, but the teacher is not necessarily granted the right to meet with the board in executive session and this information should be clearly explained to the teacher.

All preceedings with the teacher including considerations, consultations and hearings should be conducted impartially and complete documentation kept. It is critical that a cohesive flow of information continue up until the time of final recommendation by the board of education.

SPECIAL SECTION ON STUDENTS

Author's note:

The law in regard to students has remained substantially unchanged since the Goss case. Here follows a summary of information pertaining to:

1. Student Admission
2. Student Jurisdiction
3. Student Suspension

STUDENT ADMISSION

The United States Supreme Court decision in Goss V. Lopez emphasized that a student may not be denied his constitutional right to a free public education except upon just cause. Exclusion from school in any event would require an "evidentiary hearing" prior to suspension being imposed. (see, French, "The Second School Administrator's Legal Handbook, Chap.2, O.U. Law Center, 1975.) A related issue is that of "admission" to school.

The basic statutory right is found in Title 70, Oklahoma Statutes, 1971, §1-114, which states:

> "All children between the ages of 5 years on or before November 1 and 21 years on or before September 1 shall be entitled to attend school free of charge in the district in which they reside."

In construing this particular provision, the Attorney General, on April 20, 1959, in an opinion issued to the Honorable Oliver Hodge, State Superintendent of Public Instruction, held as follows:

> "A child cannot be refused admission to school solely because he was expelled in another district, but may be so refused if he is of a licentious or immoral character."

It has been the practice among school districts to refuse admission to a child if that child has been suspended from another district. Obviously, unless a child is a legal resident of particular school district the school district must refuse admission. If, however, the child attains legal residence within that school district then it would appear that the fact that the child was suspended or expelled in another district is not "just cause" to refuse admission. Pursuant to Title 70, Oklahoma Statutes, ss ss8-101 et. seq., with the approval of both boards of education, however, a child may be permitted admission regardless of residential requirements. If, however, the board of education refuses admission, then legal residence must be established in order for that student to attend that particular school.

Accordingly, it is essential for a school district to promulgate rules and regulations as to admission to school. Conditional requirements as to admission may include physical examinations, tuition payments, age and classification requirements and finally, residential requirements. Such items as class fees would only be pre-requisite to the particular class involved. Basically there is not much difference between refusal to admit and suspension from school. The difference, if any, is in the fact that once the student's admitted he subjects himself to all student behavioral rules and regulations, but is not subject to them prior to admission. Litgation involving admission to school is extremely limited. In 1971, there was local litigation involving the admission of a student to an institution of higher education. The college involved had a rule that admission could be refused if the student was found to be "socially unacceptable." Pursaunt to negotiations between the parties, it was determined that this rule was vague and arbitrary and could not be reasonably enforced. The student was admitted.

A school district may be required to rely upon the premise that admission to school will have disruptive and/or destructive effect upon school personnel, students or property. This should be contained in a written school regulation, and would have to be justified and substantiated if challanged. In the opinion previously cited, the Attorney General did hold that:

> "A school district may refuse to permit a child to attend school on a tuition basis because of the child's expulsion from another school or for any other reason." (emphasis added)

Accordingly, it would appear that on a tuition basis, admission is strictly at the discretion of the school district. This does not apply, however, to the situation where the child is a resident of that district and he can only then be excluded upon just cause relating to his character. Obviously, expulsion or suspension from another school would relate to the child's character.

Further, problems would exist as the conduct of a hearing as to admission, since prior to admission the child and/or his parents are not necessarily subject to the school's jurisdiction. Residence within a school district would subject the child and his parents to the school's jurisdiction, even though actual enrollment had not occurred.

Student admission procedures and policies should be stated in each school district's rules and regulations. There is very little difference between refusal to admit and suspension from school, once the child is a bonafide resident of the district. Exclusion from school is a deprivation of a constitutional and statutory right and must be based upon "just and proper cause."

STUDENT ADMISSION POLICY

Every student of legal public school age as defined by Title 70 $\frac{S}{S}$ 1-116, who is a legal resident of the school district, or whose transfer has been approved by the board, is eligible to attend school, but must, prior to

admission, meet all conditions of enrollment and general qualifications as delineated here.

A. BASIC ELIGIBILITY:

(1) Legal Residence (2) Legally transferred

B. CONDITIONS OF ENROLLMENT:

(1) Tuition (2) Physical Examination

(3) Special and Lab fees (Specific Classes Only)

C. General Qualifications:

(1) Age (2) Satisfaction of prior schooling (grade level)

(3) Behavior record (licentious/immoral)

(4) Academic

STUDENT JURISDICTION

A school district is not responsible for a child in transit to and from school unless the school provides the means of transportation. Based upon the premise that one cannot be held responsible for that over which he has no reasonable control, this appears to be the only reasonable interpretation possible. This is not to say that a school district cannot assume the responsibility if it takes affirmative action regarding an incident that occurs during the student's transit. In this regard, many school districts have preferred to possess the authority to enforce regulations governing pupil conduct off the school grounds and out of school hours.

The rule is well established that this assumption of authority is permissible and discipline may be administered provided that the act tends immediately and directly to destroy the discipline and to impair the efficiency of the school. Courts will permit such authority, but along with the authority goes the responsibility.

Title 70 O.S. 1971, §§6-114 provides that "The teacher of a child attending a public school shall have the same right as a parent or guardian to control and discipline such child during the time the child is in attendance or in transit to or from the school or any other school function authorized by the school district ...". Some educational authorities have argued that this provision not only authorizes school district control over transit periods, but holds the school district responsible as well. It appears more logical to argue that the provision merely institutes the "right" and is not mandatory edict and further, the "transit period" referred to could easily refer to control when the school district provides the means of transportation. It is important to remember that while the Courts have been anxious to confer out-of-school responsibility upon school districts, they have severely limited school authorities in regulating the distribution of publications, saying that such regulation and control would be permissible only upon school grounds.

Adequate and reasonable control upon school grounds also poses a problem for the school district. Is the school district responsible for a child if the child enters the school grounds at a time when no school supervision has been scheduled nor is available? This is a common situation, particularly where a school bus arrives several minutes prior to the commencement of school. Logically, a school district must afford supervision at a reasonable interval between arrival and the first bell. Circumstances such as school locale, school transportation schedules and school size would be determiniative. Once a schedule has been established, it should be immediately communicated to all parents clearly indicating school ground hours.

A case decided in Oregon, although not directly in point, lends credence to the principle of a school district's responsibilty for children in absence of responsibility for children in private transit to and from school. In

this case, a child was struck by a car while attempting to cross a street after departing from the school district's bus. The Court, in dismissing the school district from liability, held that "The school bus could not reasonably be said to have a duty to deliver each child to his respective home in such a manner that no child would be required to cross a street."

It accordingly appears both logical and reasonable to assume that if a school district is not responsible for a child once the child departs the school bus, then the district would not be responsible once the child has departed the school grounds, absent the use of the intervening public vehicle.

There is no question that "it is the duty of a school to use ordinary care and to protect its students from injury under circumstances which would reasonably have been foreseen or could have been prevented by the use of ordinary care". It is not reasonable to believe that a school can foresee or prevent everything that may happen to a child in transit via private means to and from school.

> "A woman pupil of a state normal school may be excluded from attendance for smoking cigarettes on the public streets and riding through the streets in an automobile, seated on the lap of a young man."

The foregoing statement is the holding of the Michigan Supreme Court on March 5, 1924. Obviously, things have changed, but the question as to a school's jurisdiction over a student when that student is located on premises other than actual school property, before, during and after normal school hours, continues to be a complicated issue.

A school may desire to maintain jurisdiction over a student when that student is off the school grounds, in order to effect discipline in line with the general community thinking that a school is responsible for its students at all times. Along with jurisdiction to control and discipline, though, goes possible liability, if the child happens to be injured at a location off the campus when he has permission to be there (e.g., open lunch period, before and after normal school hours).

Traditionally the rule has been that the power of school authorities to suspend or expel pupils is not limited to acts done by pupils in school, but may be exercised in proper cases as to offenses committed outside of school hours and not in the presence of the teacher, although pupils cannot be suspended or expelled for matters which are within the jurisdiction of their parents rather than of the school authorities. Further, school authorities may also punish for acts committed outside of school hours even after a pupil has returned to his home, where such acts have a direct and immediate tendency and immediate tendency to influence the conduct of other pupils while in the school room, to set at naught proper discipline, to impair the authority of the teachers, or to bring them into ridicule and contempt. Other courts though, have held that a board of education has no power to punish for acts outside of school effecting its discipline, if they are not immoral or prohibited by any rule or regulation. Acts may be forbidden when the prohibited act and the discipline and welfare of the school are directly related and immediate, not remote or indirect.

Boards need to determine appropriate regulations as to their jurisdiction over students and an "immediate vicinity" doctrine might be considered and made applicable to the situation. In other words, when the act is

committed in the "immediate vicinity" of the school, control and appropriate discipline would be afforded regardless of the actual position as to the school premises. As to normal school hours, except open lunch periods, if a student leaves the school premises, parents should be notified. A student should never be sent home without notifying the parents, nor should students who have permission to depart the school premises for the balance of the day, be permitted to return to school premises during the remainder of that particular school day. If they do return, they subject themselves once again to the jurisidction of the school authorities.

It is probably inappropriate to punish a young woman for smoking cigarettes and riding down the street in a lap of a young man (assuming the particular street is not one included within appropriately marked school zone).

STUDENT SUSPENSION

The United States Supreme Court in Goss v. Lopez (43 L.W. 4181, January 22, 1975) held that before a student is suspended for any length of time, the student and his parents must be provided notice, an opportunity to review and present evidence and an opportunity to respond to the charges at an "evidentiary hearing" conducted before a school administrator.

In attempting to define what is meant by an "evidentiary hearing," the Court indicated that it must be something more than just a parental conference, but may be something less than a formalized due process hearing. Normally, a parental conference includes more of a rehabilitative atmosphere as the student concerned has essentially been assumed guilty of the violation. The formalized hearing would normally include permitting legal counsel for the student and stricter rules of evidence, e.g., the presentation of oral testimony from witnesses who can testify directly as to the incident in question; and, the student would not be required to testify.

In Boykins v. Fairfield Board of Education (492 F.2d 697, 1974), the Fifth Circuit Court of Appeals talked of an informal student evidentiary hearing and indicated that the use of written statements during the course of the hearing would be permissible. This is known as the "flexibility" policy. Boykins also indicated that "basic fairness and integrity of the fact-finding process are the guiding stars."

An exception to the Lopez rule should be noted here. When, in the school official's judgment, the continued presence of the student on campus would result in a dangerous and/or disruptive situation, the student may be immediately removed prior to the evidentiary hearing, but in such a case, the student's case must be determined within 72 hours of his removal.

Here follow some recommendations for the conduct of the initial evidentiary

hearing. It is important to note that we are not discussing the appeal process, but rather are discussing the opportunity to determine guilt or innocence and if appropriate, the imposition of reasonable punishment.

1. The school official conducting the hearing should be one who was not involved in any way in the alleged incident;
2. Written documentation should be provided both the student and his parents as to (a) the alleged violation; (b) what type of evidence supports the violation; and (c) when the evidentiary hearing will be conducted;
3. The school official should conduct the proceedings in an informal manner and encourage communication between the student, his parents, the testifying witness and the school official himself. Use of written statements requires that copies be provided in advance to the student and his parents;
4. Once all appropriate evidence has been heard, then a decision must be issued in writing and appeal rights provided the student and his parents. If the student and his parents indicate their desire to appeal the decision, then the student will remain in school until final disposition of the matter is made by the Board of Education.

We are talking here about "procedure" only. Obviously, before any procedural due process is applicable, the school district must first have adopted a "Student Code of Conduct" and have such "Code" distributed to all students and their parents. Restrictions and prohibitions must be made clear to the person who is subject to them.

Finally, the imposition of punishment must be fair and reasonable. Oftentimes appeals do not challenge "guilt," but do challenge the length of suspension given. A student's past record cannot be used in determining guilt,

but it can be used in determining extent of punishment so long as the student and his parents are aware of the basis of such determination.

The burdens of Lopez may be difficult and time-consuming, but fairness in regard to the student disciplinary matters is an important consideration. Remember that to be procedurally correct means that the merits of the case will not be defeated.

It is absolutely necessary to have adopted a set of substantive rules which set out specific prohibitions as approved by the board of education. As school district can no longer assume that a student knows that he is not permitted to assault a teacher. The prohibition must be spelled out in a student conduct code. Moreover, this code, once approved, must be distributed to all students to assure they have proper notice as to the prohibitions.

When a violation of the code is reported, the first procedural step is to conduct an informal evidentiary hearing at the local school building level in which the student is given the opportunity to tell his side of the story. This proceeding, although it's not specifically required, should include the parent. The student suspension statute of the State of Oklahoma (70 O.S. §§24-101) provides an appeal to the board of education. This appeal does not necessarily constitute a complete due process hearing, but rather, provides the opportunity for the board of education to review what has previously happened relative to the evidentiary hearing which was conducted at the school building level. Accordingly, it is most important that the principal or other person who conducts the evidentiary hearing, prepare a report as to his findings and recommendations and file this report with the chief administrative officer or his immediate superior. Then, pursuant to an appeal filed with the board of education, the board of education may review the

report and hear additional arguments at their discretion.

It is not an easy task to draft an effective and efficient student conduct code. It is recommended that you call upon various sources to assist in such drafting, including students, faculty, parents and administrators. There are many pitfalls involved in such drafting. For example, if the code provides that a student may be suspended for commission of a felony, then the student can only be suspended once he was actually convicted of a felony. This would mean awaiting processing by the appropriate criminal authorities before the school could act. If prohibited conduct takes place on school grounds or during a school sponsored function, then the school can proceed and process the violation themselves and upon a finding of guilt, suspend, even though the civil authoritites have not yet so acted.

STUDENTS: Corporal Punishment

The corporal punishment issue has now been resolved at least within the jurisdiction of Oklahoma. In Graham v. Board of Education, Idabel School District #5, et. al., No. 75-46-C(USDC ED Okl., Sept. 20, 1976) a Federal Three-Judge panel composed of Judges Holloway, Daugherty and Morris, dismissed plaintiff's action with prejudice. The original complaint in this case was filed on February 27, 1975. The student was enrolled in high school, but had a chronic absentee record. School officials suspected truancy. Eventually, the student was caught playing hookey, which was reported to the appropriate school officials and the student was called in the next day to meet with the principal. The student brought a written excuse from his mother in regard to that particular absence, indicated that he was ill. Because of the direct eyewitness report of a faculty member, the principal then called the student in for a conference the next day and presented him with the information concerning his absence and provided him an alternative punishment - three licks or serve detention time. The student refused both methods of punishment and the principal then summoned the mother for a conference at which she demanded of the principal that her written excuse for the boy be accepted and that he not be submitted to any corporal punishment. The principal then indicated that the boy would no be permitted to attend school until such time as he would accept receipt of the alternative punishment. The parents filed suit in Federal Court and a preliminary hearing was held to determine whether or not the student should be put back in school pending a full determination on the merits. The temporary request was denied by the court and later a Three-Judge panel was convened and several issues were raised: (1) The constitutionality of Oklahoma's Corporal Punishment

Statute, (2) The constitutionality of Oklahoma's Student Suspension Statute, (3) Procedural Due Process violations. The Court determined that the plaintiffs were afforded full opportunity of present everything to the board which they wished to present, both in terms of evidence and argument at the time that the parents did appear before the board, pursuant to an appeal from the principal's decision. Secondly, the court determined that it is not the function of the court to sit as a reviewing court with respect to if, when or what disciplinary sanctions should be imposed on students who have been found by the school authorities to have been playing hookey. The court further noted that the student had full knowledge that the rules of the school forbade him to play hookey. The court determined that the school system had complied fully with the informal evidentiary hearing requirement of Goss v. Lopez, 419 U.S. 565 (1975) and that the student had "all the notice and hearing that the Fourteenth Amendment requires. The teachings of Lopez were fully met." In determining the constitutionality of Oklahoma's Student Suspension Statute, the court noted that although the statute falls somewhat short of Goss v. Lopez, two hearings and one appeal are enough. In other words, what actually happened superseded the minimum requirements of the statutes and the court indicated that the fact that the statute has no requirement for a hearing of any kind is of small moment to one who has had two hearings and one appeal.

No authority was presented to the court indicating an unconstitutional premise with regard to Oklahoma's Corporal Punishment Statute. Although it was not specifically cited, the court relied upon Baker v. Owen, a Three-Judge panel in a North Carolina case, in which the court disagreed with the plaintiff's claim to a fundamental right as a parent to decide the methods of punishment for their child. Since the right is not fundamental the state need

only show a legitimate and substantial state interest in using corporal punishment to justify that use. The court concluded that the state's legitimate and substantial interest in maintaining order and discipline in the public schools outweighed the parent's right to determine disciplinary measures. The Court set out the following procedure to be followed before corporal punishment is administered:

1. Corporal punishment must be generally approved by the principal before it may be used in a particular school.

2. Except for those acts of misconduct that are so anti-social or disruptive in nature as to shock the conscience, corporal punishment may never be used unless the student was informed beforehand that specific misbehavior would result in its use. Also, subject to the same exception, corporal punishment should never be employed as a first line of punishment.

3. Corporal punishment must be administered by a teacher or principal in the presence of another teacher or official, who must be told in the student's presence the reason for the punishment before the punishment is administered. The student need not be afforded a formal opportunity to present his side to the second official (the second official's presence is required by the Court to allow the student to protest and egregious, arbitrary or contrived application of punishment).

4. An official who has administered corporal punishment must provide the child's parents upon request a written explanation of his reasons and the name of the second official who was present.

The court further determined that paddling of a child does not constitute cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution. Subsequent to the Baker case, the United States Court of Appeals, Fifth Circuit, decided Ingraham v. Wright, (525 F.2d 909, 1976) wherein the proposed rules of control in the administering of corporal punishment as suggested by Baker were ignored, but in all other respects, the Circuit Court held identically with the North Carolina case. The Ingraham case is currently pending before the United States Supreme Court.

Assuming certiorari is denied the corporal punishment issue now appears to be moot.

The Graham case is the first major Oklahoma determination in regard to the Goss v. Lopez doctrine and certainly will serve as a guideline to those school administrators faced with compliance.

PROFESSIONAL NEGOTIATIONS/1977

Another legislative session has been completed and the "Professional Negotiations" law of Oklahoma remains unchanged, except for the new open meeting law exception now permitting a board to discuss negotiation procedure and policy in executive session.

Procedural agreement disputes are a thing of the past and the declaration of an impasse has become a common part of the negotiations procedure. Various individuals have now had sufficient experience in regard to impasse and accordingly, results have been acceptable.

One very realistic outgrowth of Oklahoma's "PN" law has been the negotiattion of policy matters. No longer is the teacher union satisfied to talk about salary and related fringe benefits. Policy matters are being negotiated each and every year and this poses a problem.

It has previously been assumed that a negotiations package is effective for a one-year period only. Policy matters, however, are being negotiated in anticipation of the continuing effectiveness of any policy item so negotiated. For example, recently, a staff reduction policy was negotiated and eventually resolved after impasse. There was no question that the policy was intended to be a continuing one, particularly since both sides anticipated that the policy would never have to be implemented.

One problem which we have seen come out of the impasse procedure is the question of what exactly is "at impasse". What happens is, for example, one particular "package" contains five issues of negotiation. One of those five is a particularly touchy item, so the union, in accord with bargaining tactics, decides to agree to the Board's position on four of the items if the Board will go on the fifth as proposed by the union. A tentative agreement is reached by negotiation teams, but the Board eventually rejects

only item #5. Upon declaration of impasse, the union determines that all five issues are not at impasse, but the Board determines that only No. 5 is at impasse. The "PA" provides no easy answer to the problem. The next question is, can the fact finding committee first determine what is at impasse, before proceeding to resolve the particular dispute? The remaining alternative is to send the teams back to the table to resolve the question of impasse themselves.

One particular element of negotiations that apparently, has not been used extensively, is the area of scope of negotiations, whether a particular item as proposed for negotiations by the union is, in fact, a negotiable item. We have seen such policy matters established by negotiation as class size, curriculum and dismissal procedures. What happens is that when an item such as class size is proposed by the union, the board's team proceeds to talk about the item instead of first raising the issue of "scope". Once the item has been "talked about" you have opened the issue for negotiation, and you cannot later (at time of impasse for example) raise the issue of "scope". You have already waived an objection by proceeding to talk about the item at the table. The "scope" issue itself can be resolved by the fact finding committee if need be.

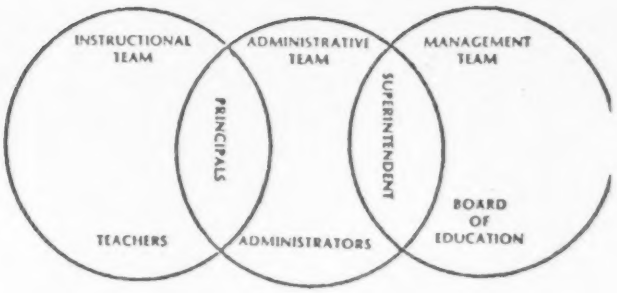
Most "PA's" provide too short a time for the compilation of a fact finding committee. Once impasse is declared, the parties should permit a minimum of twenty, and perhaps even thirty days for the committee to be officially formed. Third party selection is the process which tends to slow the procedure, but recent experience has proved that utilization of an outside source tends to speed the process itself. For example, in one case, the University of Oklahoma Law Center was asked to provide a listing of seven law professors and after

a flip of the coin to decide which side eliminates first, the seventh person was selected with very little problem. In another case, a particular persons name was duplicated on both the union and board listing and was automatically the choice (this may be a rare occurrence, but is certainly a satisfying one). Typically, however, the submission of separate listings is a waste of time, in that both sides will select only those people of whom they feel very favorable towards.

The great majority of school districts in Oklahoma continue to operate without implementation of the PN law. In this regard, several options or alternative methods are utilized and the following "Management Team" Concept represents an example of "an alternative to negotiations":

AN ALTERNATIVE TO NEGOTIATIONS

MANAGEMENT TEAM



A Position Paper

Preface

In an effort to provide some common understanding and basis for the management team concept in the operation of public elementary and secondary schools, here follows a position paper as a working document to assist boards of education and administrators as they consider the implications of the management team concept.

There is no attempt within this document to prescribe procedures and techniques that are mandatory in implementing the management team style of operation. Each school district must consider these problems in the context of local conditions. However, all of the participating organizations have a commitment to the basic concepts of the management team approach to school administration.

Definitions

A. Instructional Team. The certificated building faculty under the supervision of the principal.

B. Administrative Team. All administrators under the direction and leadership of the superintendent.

C. Management Team. The administrative team and the board of education.

Statement of Belief

Those responsible for the direction of public education are continually responding to pressures and criticisms both from within and outside the institution itself. It has become impossible to effectively manage the educational institution without some formalized structure that assures the input of all components of management in the decision-making process and a free flow of communication among the board, the administration, the instructional staff, students, parents and the general public.

It is unquestioned that today there is a direct assault upon the concept of lay control of public education. Unless lay control is preserved through the joint action of boards of education and administrators, the direction of public education will be determined by groups whose purposes are not always identical to the public need. While committed to the concept that maximum input from all educational interests is vital, effective management techniques must be developed which will preserve the delicate balance between the rightful and essential input of teachers, nonteaching personnel, students, parents and all other interested groups and the lawful responsibility for policy determination by an elected lay board of education.

The advent of collective bargaining has created additional staff-management conflicts which makes it even more imperative that a structure be created

facilitating meaningful communication among all echelons of school management. It is clear that the management team concept will be successful only if a close, cooperative and harmonious relationship exists between the board of education and administrators.

This relationship can be accomplished only if all members of the management team have a deep respect and full appreciation of the role and concerns of each of the remaining members of the team. This is something that can be accomplished only if a deep commitment to the management team concept is paramount to the interests of each individual component of the management team.

Further, it is critical that when policy decisions have been cooperatively developed in a team setting that all components of the team lay aside individual differences and support the decisions and implement the policy in the most effective way possible.

In order to function effectively the management team requires careful implementation to insure that the decision-making process incorporates the input from all concerned segments of the management structure.

It is necessary for the members of the management team to:

1. Cooperate with the instructional team, parents, students and non-teaching personnel, in arriving at clearly stated goals and purposes for the institution.

2. Arrive at clearly stated goals and purposes for the role of the management team in the institution.

3. Subordinate individual self-interest to the interests of team success.

4. Bring to bear the unique skills and expertise of each component of the team on the team tasks.

We must continually keep in mind that the primary goal of education is to provide optimum educational opportunities for students; and that all relationships within the organization must ultimately respond in an account-

able way to this goal. With this basic concept in mind, it becomes necessary for us to make every effort to insure the clarity and completeness of statements of responsibility for all elements of the management team.

Suggestions for Implementation

1. It is recognized that the superintendent must be the prime mover in bringing about the implementation of the management team.

2. The board of education should adopt a policy statement which clearly indicates a commitment to the management team concept.

3. The administrative staff should cooperatively develop the levels of involvement of each administrative position in the following activities:
   a. Goal setting
   b. Planning
   c. Organizing
   d. Coordinating
   e. Communicating
   f. Decision-making
   g. Directing
   h. Evaluating

4. The management team should define the career role of the professional administrators with regard to support, function, responsibilities, salary and fringe benefits, opportunities for advancement and personal role with relation to the administrative team. It is necessary to provide an acceptable channel for consideration of management team welfare concerns.

5. Incorporate management team participation in the preparation for, conduct of, and administration of negotiations with employee groups.

6. Local boards should provide inservice education and encourage attendance at professional meetings for all administrators to update and improve knowledge and skills to meet the demands for more sophisticated performance on the part of the administrators.

The administrative team, which becomes the operational arm of the management team, is responsible for the translation of management team policy development into reality.

It is acknowledged that there is difference in point of view of the educational management associations regarding the question of a bargaining unit for administrators. One point of view is that the existence of a bargaining unit for administrators inhibits the development of the management team concept. Those expressing this point of view are concerned that it is difficult for a team to function effectively in one setting and have individual members of the team assume adversary roles in another setting.

Others express the feeling that an administrative unit for the purposes of negotiating salaries, fringes, and other welfare items should not hinder the development of the management team. In fact, those holding this view feel that the areas of team responsibility and operation become clearer when the items mentioned above are handled in another setting.

Irrespective of legislation upon this matter, the decision must be made within each school district.

In all of the other reasons stated in this paper it is the definite recommendation of all the participating organizations that all schools should make an effort to develop a management team that can accomplish the difficult tasks of effective management of schools in today's complex society.

MANAGEMENT TEAM

The superintendent's Management Team has been organized on the premise that the multiple responsibilities of the superintendent can be better served by establishing a means which will permit the best thinking of all staff members to be brought to bear on school problems. Although the board and the superintendent cannot absolve themselves from legally constituted responsibilities for the establishment of policy and its administration, the team provides for a two-way flow of information and effective action resulting from group thinking.

The members of the team act in an advisory capacity. Their mission is to gather ideas, to present reactions of district personnel, to express opinions, and to interpret school policy to other staff members in the light of detailed information they receive through discussions in meetings.

The members of the Management Team include the positions designated as Management Positions, plus the business manager, curriculum coordinator, pupil personnel coordinator, instructional materials coordinator and coordinator of certificated personnel.

OMBUDSMAN

In order to assure that each student is informed concerning his rights and responsibilities there may be established at the discretion of the student government in each high school the position of ombudsman. Ombudsmen shall be elected by or composed of members of the student government or elected by the student body at large. The number of ombudsmen needed in any school shall be determined by the student government in consultation with the principal. Ombudsmen shall serve voluntarily and without compensation and may be qualified students of that school, parents, teachers, counselors, or responsible qualified citizens of the community at large.

It shall be the responsibility of the superintendent to provide the necessary training of ombudsmen prior to their taking office and to establish a procedure for declaring an individual unqualified or unfit to serve as an ombudsman.

In no case shall an ombudsman supersede the right or obligation of a parent to counsel, protect, or represent his/her son or daughter.

SPECIAL SUPPLEMENT

Evaluation and Analysis of Senate Bill 249

Senate Bill 249 (Oklahoma's new teacher tenure law) became law on the 17th day of June, 1977. This law supersedes Sections 6-120 (dismissals) and 6-122 (non-renewals) of Title 70 and establishes on procedure for the dismissal or non-renewal of a tenured teacher and one procedure for the dismissal or non-renewal of a non-tenured (probationary) teacher. In this regard SB 249 has abolished the Professional Practices Commission and has eliminated the State Board of Education from the procedural process (except that the State Superintendent does still play an important role).

1. The Evaluation Procedure.

Initially, SB 249 requires that prior to October 15, 1977, each Board of Education shall establish a written policy of evaluation for all teachers which shall be a "negotiable item" for those districts involved within the professional negotiations process. Within such procedure, it is required that all probationary teachers shall be evaluated at least two times per school year, once prior to November 15 and once prior to February 10; and that all tenured teachers shall be evaluated at least once every three years. This evaluation procedure includes administrators and the frequency dictated establishes a minimum requirement. The law further provides that a copy of each evaluation will be presented to the teacher and the teacher is afforded the opportunity within two weeks to respond, said response being made a part of the record. It is clear that any action on the part of a Board of Education to terminate any teacher will fail unless the evaluation requirement has been fully met. The law further assigns to the building principal the responsibility for the evaluation program and requires that principal to bring any

problem matter to the attention of the teacher in writing and thereafter permit a reasonable time for improvement, which time should not exceed two months. Thereafter, upon failure to improve and/or comply, the principal forwards his recommendation to the superintendent who thereafter has authority to make a recommendation to the Board of Education. Upon such a recommendation being received by the Board, and confirmed upon proper vote taken in open meeting, the Board shall cause written notice to issue by certified mail restricted delivery with return receipt requested to the teacher who is the subject of such dismissal or non-renewal. At this point, there is a difference between procedural due process as to the tenured teacher and the non-tenured teacher.

2. The Notice Procedure.

As to the non-tenured (probationary) teacher, the notice issued must contain a statement of termination and must state the right of the teacher to have a due process hearing conducted by the Board of Education, which will be final and non-appealable. The teacher must respond within ten days of receipt of the notice.

As to the tenured teacher, the notice so issued shall contain the statement of dismissal or non-renewal, a statement of cause or causes for the dismissal or non-renewal and a statement as to the right of the teacher to have a hearing conducted by a duly constituted hearing panel. Again, the tenured teacher must respond within ten days and if the teacher so responds to the clerk of the local Board of Education, the clerk will then immediately notify the State Superintendent of Public Instruction.

3. The Hearing Panel Procedure.

The State Superintendent shall then submit a list of 21 names (taken from a list of 200 Oklahoma attorneys provided by the Oklahoma Bar Association),

to both the tenured teacher and the Board of Education, who shall jointly select one name as chairman of the hearing panel. A process of elimination is required unless both parties can immediately agree upon one individual from the list. Concurrently, both the teacher and the Board of Education shall select a representative to be members of the panel. The panel shall schedule a hearing within ten days after the panel has been duly constituted which will take place in accordance with procedures delineated in SB 249. Cost of the proceeding will be divided between the teacher and the Board of Education with the exception of respective attorneys fees. Within 30 days from the time the panel has been constituted, the hearing shall be completed and a written report prepared and submitted to both parties. The deadline for the report can be extended. The decision of the hearing panel is final except that either party may appeal its decision to the District Court for review in accordance with the Oklahoma Administrative Procedures Act.

4. The Suspension Procedure.

During the course of initial notice, the school district has the authority pursant to SB 249 to suspend a teacher if such action is found to be necessary in the best interests of the children, but the teacher will not forfeit any pay or benefits pending a final determination as to the matter.

5. Applicable Personnel.

SB 249 eliminates certain certified personnel from its coverage - substitute teachers, adult education teachers, teachers who are employed in positions fully funded by federal or private categorical grants, teachers who are employed on temporary contracts, county superintendents and school

administrators only insofar as they cannot attain tenure as administrators (they do have rights under SB 249 as tenured teachers).

The qualification for tenure and these stipulated grounds for dismissal or non-renewal remain the same as before, except "incompetency" is now included by SB 249.

ABOUT THE AUTHOR

Dr. Larry L. French received is Juris Doctorate from the University of Oklahama in May of 1970. After serving two years as an Assistant State's Attorney General, during which time he authored his first book of education law (The School Administrator's Legal Handbook, O.U. Law Center, 1972), he assumed concurrent duties as a Professor of Political Science & Law at Seminole Junior College and as an Education and Negotiations Consultant for various school administrator organizations and school districts. He has also served as Legal Counsel for Seminole Junior College and special legal advisor for the Oklahoma State Regents for Higher Education. In 1974, he assumed the additional post of Associate Professor of Graduate Education for the University of Oklahoma, teaching public law. Over the years, Dr. French has made numerous presentations to educator groups on a national basis and has written numerous articles in the field. His published books include, Oklahoma Schoolhouse Law (1973), The Powers & Duties of An Oklahoma School District (1974), The SECOND School Administrator's Legal Handbook (1975), Education Law/ 1976 (1976) and A Handbook on Professional Negotiations (1977). Dr. French serves as an Executive Committee member of the NSBA Council of School Attorneys, Secretary-Treasurer & Editor of the Oklahoma School Attorneys Association, State Chairman (Okla) for NOLPE and is a continuing member of the American Political Science Association, the American Business Law Association, the National Association of Business Law Teachers, the New England Historical Association and the National Association of College and University Legal Counsel. Effective August 1, 1977, Dr. French assumed the duties as General Counsel of Southern Illinois University at Edwardsville.